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IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1978
No. ____

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES and DONALD W. MOOS, Its Director,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents,

MAKAH TRIBE, LOWER ELWHA BAND OF CLALLAM TRIBE, PORT GAMBLE BAND OF CLALLAM TRIBE, SUQUAMISH TRIBE, LUMMI TRIBE, NOOKSACK TRIBE, and SWINOMISH INDIAN TRIBAL COMMUNITY,
Intervenors-Respondents.

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES,
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vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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Petitioners Washington State, Washington State Department of Fisheries and the Director of that Department, hereinafter referred to as the "State," pray that a writ of certiorari issue to review judgments and opinions of the United

States Court of Appeals for the Ninth Circuit entered in these proceedings on April 24, 1978.

OPINIONS BELOW

The petitioner has, pursuant to Rule 23.5, joined two decisions by the Ninth Circuit which involve identical or closely related questions on the nature and extent of Indian treaty fishing rights.

A. *United States v. Washington,* 573 F. 2d 1123 (9th Cir. April 24, 1978) (hereinafter referred to as "Washington fishery case.")

In 1977, the United States and numerous Indian tribes requested the District Court to order that specific numbers of fish be guaranteed to treaty Indians (approximately 50% by run, species and area). They also requested the Court to assume direct control by injunction of the fishing activities of non-Indian commercial net fishermen with enforcement by citation of violators for contempt of court. The District Court in the exercise of its continuing jurisdiction in *United States v. Washington,* 384 F.Supp. 312 (W.D. Wa. 1974), 520 F.2d 676 (9th Cir. 1975), cert. den. 423 U.S. 1086 (1976), granted those requests in an unreported series of orders culminating in a Salmon Management Plan (App. 61-77), Findings of Fact and Conclusions of Law Re Enforcement of 1977 Fisheries Orders (App. 79-87) a Memorandum and Preliminary Injunction a Preliminary Injunction Re En-

forcement of 1977 Fisheries, (App. 35-60), a Preliminary Injunction Order (App. 93-100), and a Preliminary Injunction Staying State Court (App. 101-104).

The petitioners' appeals of those orders were consolidated by the Circuit Court of Appeals with mandamus actions brought by nonparty fishing organizations[1] whose members' activities were enjoined by orders of the United States District Court. The United States Court of Appeals on April 24, 1978, entered a decision affirming the District Court (573 F. 2d 1123 (1978)) (App. 1-28).

B. *United States v. Washington,* 573 F. 2d 1118 (9th Cir. April 24, 1978) (hereinafter referred to as the "International Fishery case.")

The United States on behalf of certain Indian tribes, and some tribes as intervenors, requested in mid-1975 that treaty Indians be granted special fishing seasons in waters under the regulation of the International Pacific Salmon Fisheries Commission. That Commission (hereinafter referred to as the "IPSFC" or "Commission") was established by a 1937 Convention between United States and Canada, ratified by the Senate and proclaimed August 4, 1937 (50 Stat. 1355, supplemented by 8 T.I.A.S. 3867,

[1] Despite requests, no non-Indian fishing group organizations have been permitted intervention by the United States District Court judge handling this litigation, although one group was granted intervention by another judge.

8 U.S.T. 1057). The plaintiffs and intervenors also sought a court order that treaty Indians are entitled to 50% of the American share of those runs. The United States District Court for Western Washington, acting under its continuing jurisdiction in *United States v. Washington, supra,* conducted hearings and entered orders which culminated in Supplemental Findings of Fact and Conclusions of Law, Decree and Injunction (App. 105-20). The District Court decided that treaty Indians do not have to comply with certain regulations of the IPSFC and that they are entitled to 50% of the American harvest of those fish runs.

Petitioners appealed the 1975 decision (No. 75-2835). An amending order and one establishing another special Indian fishery were also appealed later. (No. 76-1042). The two were consolidated. Notwithstanding the request to expedite the appeals, these matters were not heard by the court of appeals until January of 1978. An opinion was rendered on April 24, 1978, dismissing both appeals as moot. (573 F.2d 1118 (1978) (App. 29-34).

QUESTIONS PRESENTED

(1) Do the Indian treaties require an allocation of 50% of the harvestable fish to treaty Indian fishermen?

(2) Do the Indian treaties mandate an allo-

cation of harvestable fish between Indian and non-Indian fishermen when they both have an opportunity to participate in the fishery on a nondiscriminatory basis?

(3) Does the district court's equitable power in conjunction with treaty provisions permit an allocation of the fishery resource between Indian and non-Indian fishermen when they both have an opportunity to participate in the fishery on a nondiscriminatory basis? If so, has the court exceeded those powers by its specific 50% allocation formula and implementing orders?

(4) Does an allocation of a specific number or percentage of fish to treaty Indians, who are citizens, and a reduction or prohibition on commercial fishing by other citizens constitute a violation of the Constitutional doctrines of equal protection or the prohibition against granting special privileges and immunities.

(5) If the Indian treaties mandate an allocation of the harvestable fish to Indians, does the United States/Canada Convention of 1937 supersede that requirement for the fish harvest which is subject to the jurisdiction of the International Pacific Salmon Fisheries Commission?

(6) Do the Indian treaties, or can the United States District Court, grant Indians an immunity from the enforcement of IPSFC regulations?

(7) Can the United States District Court assume control of the management of the fishery resource within Washington state waters?

CONSTITUTIONAL PROVISIONS, TREATIES. STATUTES INVOLVED

Constitutional provisions, treaties and statutes involved are as follows and are reproduced in Appendix A, *infra*, pp. A-128 to A-167.

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TREATIES

Six treaties were entered into by the United States with various Indian tribes and bands living in the State of Washington in 1854 and 1855. Those six treaties each contain a similar fishing provisions and only those provisions are set forth in the appendix.

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STATEMENT OF FACTS

In anticipation of an increased influx of settlers in the Pacific Northwest a series of treaties were executed in 1854 and 1855 with Indians in what are now the states of Washington, Oregon and Idaho. At that time the Indian settlements were widely dispersed and fish was a major source of food supply with the Indian fishery being primarily for subsistence. While the treaties contemplated the creation of reservations, they also provided for the continuation of Indian fishing, each of the treaties adopting essentially similar language.

> * * * the right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the territory. [1†]

Until the invention and perfection of the canning process in the late 19th Century, commercial fishing enterprises in Washington were rudimentary and mostly unsuccessful. The advent of the canning process gave rise to the development of large-scale commercial fisheries which have been and now are open to all citizens, both Indians and non-Indians. The Indians use essentially the same fishing gear as non-Indians and have the same economic incentives to participate in the fishery. They are not, however, charged license fees nor do they pay landing taxes.

[1†] *Tulee v. Washington*, 315 U.S. 681 (1942).

The five species of salmon: chinook, Coho, Chum, Pink and Sockeye, spawn in fresh water and migrate to the ocean where they reach maturity. Each salmon subsequently seeks to return to its river of origin to reproduce the next generation of its species. In Washington these fish are produced naturally in 15 major river systems and their tributaries, and 239 small independent streams. In addition, the state augments natural runs with hatchery produced fish and in some rivers and streams the state has created runs of fish which did not historically exist. In addition to the fish which are spawned in Washington rivers, a substantial Washington fishery occurs on Canadian Fraser River fish runs which are subject to the jurisdiction of the International Pacific Salmon Fisheries Commission.

For many years the State of Washington has regulated commercial and sports fishing to conserve the salmon species and provide for an orderly fishery. The IPSFC has similarly exercised regulatory control over the harvest of Fraser River salmon in the waters of the State of Washington and the Province of British Columbia since the ratification of the United States-Canada treaty in 1937.

The United States District Court in this proceeding originally decreed that the Indian treaties mandated an *opportunity* on the part of treaty Indians to harvest 50% of the fish runs. This 50% formula actually provides substantially

in excess of 50% of the fishery to treaty Indians. The court determined that the Indian harvest of fish for ceremonial or subsistence purposes, plus that within the boundaries of an Indian reservation, are first subtracted from the total fish available for harvest before dividing the remainder into equal shares. Finally, the court has declared that when Indians harvest fish outside of their usual and accustomed grounds, those harvests are included in the *non-Indian* share.

The District Court has subsequently converted the "opportunity" to a "guarantee," having allocated specific numbers of fish by species in areas for the Indian fishery. Full details of such specific allocation by number and species are set forth in the Appendix, pp. 43 to 53. In Bellingham Bay, for example, Chinook salmon allocation is: Indians - 47,200, non-Indians - 31,300 (the court assumed that 10,600 Chinook were harvested in sports and ocean troll fishery). The division for Skagit Bay is: Indians - 6,600; non-Indians - 2,800 (the court assumed a non-Indian harvest of 1,800 in the sports and ocean troll fisheries). South Sound Coho: Indians - 231,000; non-Indians - 154,000 (the court estimated 100,000 to have been harvested in the sports and ocean troll fishery).

In the foregoing allocation of a guaranteed fish harvest for Indians reference has been made to the ocean fisheries. In 1976 Congress enacted

the Fisheries Conservation and Management Act (PL 94-265; 90 Stat. 331, 16 USC 1801-82). Under that act the United States government has assumed preemptive jurisdiction to regulate all fisheries in the zone commencing 3 miles off shore to 200 miles. It is within that fishing zone in which the United States is exercising preemptive jurisdiction that a substantial portion of the ocean fishery occurs.

The District Court in implementing what it believed to be the mandatory allocation of the fishery resource between Indians and non- Indians has essentially assumed responsibility for the management of the fishery resource in the case area. The court has authorized various tribes to enforce fishing regulations in areas outside of their reservations. It has also required that approval be obtained from Indian tribes for some state fish management decisions. The state courts have been enjoined from proceedidng with litigation which has been filed in those courts. The District Court has effectively required special Indian fishing seasons in IPFSC waters which are not authorized by that international commission. The court has also, in order to enforce its orders, invoked contempt powers against nonparties and has effectively forced the federal agencies to undertake actions which are beyond their normal duties and responsibilities.

REASONS FOR GRANTING WRIT

A. Introduction

Petitioners are currently caught between conflicting decisions of the highest appellate court of the state and the lower federal courts involving treaty Indian fishing. We have described the conflict and have sought review of the state court decisions in No. 77-983. The instant petition presents the opportunity to review jointly[2] those conflicting state and federal court decisions which can only be resolved by this court.

The fundamental question in this litigation, which has had substantial social, economic and governmental repercussions, is the meaning of the treaty provision:

> The right of taking fish, at all usual and accustomed grounds, and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing together with the privilege of hunting, gathering roots and berries, * * * on open and unclaimed lands. Provided however, that they shall not take shellfish from any beds staked or cultivated by citizens. (Article 4, Treaty of Point-no-Point, 12 Stat. 933)

[2]If this petition and our petition in No. 77-983 are granted and consolidated for hearing.

The Circuit Court has affirmed the District Court conclusion that that provision mandates 50% plus[3] of the harvestable fish be allocated to Indians. Virtually all of the other issues in this litigation essentially have involved the implementation of that allocation and its impact upon management of the fishery resource by the State of Washington and the International Pacific Salmon Fisheries Commission, and the substantial impact upon non-Indian fishermen and others.

Not only is there a substantial conflict between the state and federal court decisions, but there are also conflicts between those federal court decisions and prior decisions by this court. While there have been a series of decisions by this Court defining treaty Indian fishing rights under the treaty language in question, none of those decisions have required an allocation of the resource between Indians and non-Indians when both groups have been permitted access to the fishery resource on a nondiscriminatory basis.

The *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973) (hereinafter referred to as "Puyallup II") and *Puyallup Tribe v. Depart-*

[3]The court's allocation provides that the Indians are entitled to (1) a reservation catch, (2) ceremonial harvest, and (3) a subsistence fishery, all three in an amount determined by the Indians. All three come off the top; that is, they are subtracted from the total before dividing into 50% shares. Furthermore, the court has decreed that fish caught by Indians outside their usual and accustomed grounds count as part of the non-Indian share.

ment of Game 433 U.S. 165 (1977) (hereinafter referred to as "Puyallup III") decisions made reference to an allocation. However, in those cases, this Court indicated that the state could not close an Indian fishery while permitting non-Indians to continue to fish unless there had been an allocation of the fishery resource. The allocation reference in *Puyallup II, supra,* addressed the question of whether a closure of Indian fishing while permitting the continuation of non-Indian fishing constituted a discriminatory closure. See, *Puyallup Tribe v. Department of Game,* 391 U.S. 392 (1968), hereinafter referred to as "Puyallup I." This is in distinct contrast to the present decree which requires that marine areas which are open and available on a nondiscriminatory basis for fishing by Indian and non-Indian groups to be closed to non-Indian commercial fishing so that the Indians will harvest 50% of the resource.

In the instant proceeding, the United States District Court *ruled that a 50% allocation is required by the treaty as a matter of law.* That court has consistently[4] applied the 50% formula in disparate factual situations. The "Washington Fisheries case," *supra*, involves the Indian fishery in Washington waters on primarily Washington origin stocks, both hatchery and natural.

[4]A slight adjust for some areas and species was made in 1977, after an oral request by a United States Attorney communicating a Presidential Task Force's concern that a lesser share for that year would be more equitable.

And the same 50% formula has been applied by the District Court to the Indian fishery in Washington waters under IPSFC jurisdiction on stocks bound for Canada's Fraser River though only a few tribes have treaty rights in those waters. This is "International Fishery case," *supra.*[5]

The court of appeals affirmed the allocation and implementing management system[6] in the "Washington Fisheries case," *supra,* on the basis that it was an exercise of equitable discretion by the district court (App. 11) *yet the District Court had adopted the 50% sharing as a matter of law, mandated by the treaty language.*[7]

In contrast, this Court implicitly rejected the concept that the treaty mandated any specific allocation in *Puyallup II, supra,* stating:

> What formula should be employed is not for for us to propose. There are many variables—

[5]*In each of those cases, prior to the court's orders, the Indians had had the opportunity to participate along with non-Indians in the* fishery harvest, on a nondiscriminatory basis and would continue to have that opportunity even in the absence of such orders.

[6]In that case, the federal district court determined the numbers of fish produced by area of origin and set specific numbers of fish the Indian fishermen were to be provided, by area and species. (App. 43-53) Non-Indians were enjoined from net fishing in those areas unless authorized by a "Hotline" (recorded telephone message). (App. 97-98) The non-Indians were not authorized to fish where such fishing could result in treaty Indian fishery catching fewer than the numbers guaranteed the Indians by the court's orders.

[7] [8]The District Court stated,

"By dictionary definition and as intended and used in the Indian treaties and in this decision 'in common with' means *sharing equally* the opportunity to take fish as 'usual and accustomed grounds and stations;' * * * " *U.S. v. Washington,* 384 Fed. Supp. 312, 343 1974).

> the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when the nets may be used.

Supra, at 49.

Notwithstanding this specific statement by this Court, the District Court,[8] and the Circuit Court in affirming, failed to consider those or any other variables which this Court deemed relevant in *Puyallup II, supra*. The Court of Appeals stated:

> Comparison between the number of treaty and nontreaty fishers, or the quantity of fish each category has an opportunity to take, are simply irrelevant under the law.
> ("Washington Fishery case", supra, at 1128)

In the "Washington Fishery case," *supra*, two of the three Court of Appeals Judges indicated doubt that 50% is the proper formula.

> It has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation of those treaty rights. (pp. 1135-1136) (Judge Kennedy concurring quoted with approval by Judge Wallace in his separate concurring opinion. App. 28 and 28)

The two concurring judges, despite believing that the allocation was not justified, felt they were bound by the earlier decision in *United States v. Washington, supra*. The instant proceeding is a continuation of that proceeding which this Court has not considered on the merits. It must be emphasized that the current decision in *United States v. Washington, supra,* here sought to be reviewed differs from the original judgment. This is dramatically evidenced by the characterizations of that decision made to this Court by the United States when review was sought of the original decree in *United States v. Washington, supra*.

[8]The District Court stated,
"By dictionary definition and as intended and used in the Indian treaties and in this decision 'in common with' means *sharing equally* the opportunity to take fish as 'usual and accustomed grounds and stations;' * * * " *(U.S. v. Washington,* 384 Fed. Supp. 312, 343 1974).

The state anticipated that the District Court's original decree might be transformed from an "opportunity" to harvest up to 50% to a "guarantee" of a specific number of harvested fish. In opposing the petition for certiorari of the State, the United States assured this Court that the District Court was not guaranteeing any particular harvest to the tribes:

> It should be clear that the 50 percent guideline is not a guarantee of any harvest. It is simply a readible understandable measure of what portion of the harvest the tribes as a group may rightfully insist they should have *a chance* to take in varying circumstances. The share worked out for specific runs in particular years for specific tribes will vary from the guideline, in accordance with extent of Indian fishing capability, the size of the run, the degree of Indian and non-Indian interest in the run, and the give and take of cooperative operations.

Page 20, United States' brief in opposition to certiorari, Nos. 75-588, 592, 705 *supra*, emphasis in original.

The District Court's present implementation of its decision (at the request of the United States Government) does not comply with these assurances. The district court's implementation in the Washington Fishery case is a guarantee to the Indians of a specific number of fish from each run. See App. 43 to 53 and pp. 10 of this petition. Furthermore, despite the fact that many treaty Indians may choose not to fish a particular run (particularly true of the International fishery), the court has not made any meaningful changes in its 50% formula.

Among the decisions included in this petition is the International Fisheries case, *supra*. That decision has extended the District Court's 50% formula to fisheries which are subject to the jurisdiction of the International Pacific Salmon Fisheries Commission. These actions by the court have provoked an objection from the Canadian government and the Commission.

The dollar amount of the fishery impacted by these orders is in the 10's of millions of dollars. Substantial numbers of non-Indian citizens are being restricted in their fishing activities while neighbors who are descendants from members of bands, tribes[9] or groups party to the treaties are granted special additional fishing times in addition to those they share with their non-Indian neighbors.

[9]The federal district court has extended these special treaty rights to members of groups which are not recognized as tribes by the United States Government and thus have no approved role. It requires a showing of blood quanta for such rights.

It is thus ironic that the Court of Appeals, in dismissing the appeals in the International Fisheries case, *supra*, admitted:

> It must be quite apparent that the case tendered for our decision here would require us to address procedural questions that touch upon fundamental principles controlling the delicate balance of state and federal power. Beyond those questions we would further be required to interpret substantive rights of the parties under *United States v. Washington* that are of great significance to the fishing industry in the Northwest.

This extension of the 50% formula to the commission waters is in clear contrast to the position asserted to this Court by the United States in their reply to the state's petition for certiorari in 75-588, where, at page 33, it was stated:

> Both courts below specifically recognized the supremacy of IPSFC regulations. If any subsequent actions interfere with the regulations of the Commission, they are not sanctioned by the decision.

The treaty with Canada requires both countries to enforce the commission regulations against "every national and inhabitant." (Art. IX of the Convention, App. 135-58) The implementing federal enactment (16 U.S.C. § 776, Appendix 160) makes it unlawful for any person to violate any regulation of the commission. There is no exemption for Indians in either the convention or in the federal implementing act. There

is no legislation which can be read in pari materia to create an exemption as was present in *Menominee Tribe v. United States,* 391 U.S. 404 (1965). Thus, there is no legal justification for special Indian entitlement to fish under the jurisdiction of the IPFSC. The fishery in the commission marine waters is available on an open, nondiscriminatory basis to both Indians and non-Indians. It is a violation of the treaty with Canada for the District Court to have interferred in the operations of that fishery. Further, a district court does not have jurisdiction to interfere with the conduct of international relations.

B. Conflict in treaty interpretation between the state court and lower federal courts.

There is a conflict between the District Court, the Ninth Circuit Court of Appeals and the Washington State Supreme court (the state's highest court) justifying the issuance of a Writ of Certiorari.

The Washington Supreme Court has interpreted the treaty language in three decisions which have been reviewed by this Court (*Puyallup I, II,* and *III, supra.*) The petitioners have sought review of two more recent decisions now pending in No. 77-983.

These recent two state court decisions are in direct conflict with the decisions of the circuit and district courts. The conflict was clearly rec-

ognized by the federal district court:

> In *Puget Sound Gillnetters Association v. Moos*, the Washington Supreme Court said that the Director of Fisheries may not "allocate fish among competing claimants for purposes other than conservation," and that he may not "allocate fish to treaty Indians or to non-Indians." Those rulings prevent defendants from complying with earlier decrees of this Court * * *

Findings of Fact and Conclusions of Law Re: Enforcement of 1977 Fisheries Orders dated September 27, 1977, App. 81.

> The holdings of the Washington Supreme Court are contrary to the affirmed decision and decree of this court on the federal questions of the nature and scope of the treaty fishing rights of Indian tribes and the obligations of the State toward those rights, which decision and decree are binding upon the defendants in this case, * * *

Memorandum Order and Preliminary Injunction dated August 31, 1977, App. 38.

Similarly the circuit court stated:

> The state and the non-Indian fish catchers argue that to treat Indian fish catchers differently from non-Indians in allocating fishing opportunities and determining fishing regulations is a patent violation of basic equal protection principles. The Washington state courts have accepted this argument. *See Washington State Commercial Passenger Fishing Vessel Association v. Tollefson*, 89 Wash.2d 276, 571 P.2d 1373 (1977).

and then proceeded to reject that construction of the treaties. Washington Fisheries case, *supra* at 1127 and 1128 (App. 6).

The conflict has also been recognized by the Washington Supreme Court which also refused to accede to the view of the lower federal courts:

> We are asked to accede to the federal district court's interpretation of the Medicine Creek and other Indian treaties, whereby it found that treaty Indians have the right to 50 percent of the salmon runs, plus fish for ceremonial and subsistence purposes. It appears that, if this ruling is given effect, non-Indian fishermen will be required to refrain from fishing until the Indians have harvested 50 percent of the fish runs, plus an undetermined additional number of fish.
>
> Being cited no authority for the proposition that federal district courts have exclusive jurisdiction to construe Indian treaties —treaties which affect important interests of the state—we adhere to our own interpretation of the treaty. (*Puget Sound Gillnetters Assn. v. Moos,* 88 Wn.2d 677, 691, 565 P.2d 1151 (1977)).

While refusing to concur with the lower federal courts, the Washington Supreme Court recognized that:

> The resolution of this question cannot come from this court or from the federal district court, if no definitive authority upon the subject exists. It must come from a higher court whose decisions are binding upon both of us. In short, this dilemma can be resolved only by the Supreme Court of the United States, * * *

Washington State Commercial Passenger Fishing Vessel Assn. v. Tollefson, 87 Wn.2d 417, 421, 553 P.2d 113 (1977).

In an opinion, two state supreme court justices, in referring to a hope that this issue will be resolved by this Court, stated:

> Such an interpretation by the ultimate legal authority is the only way the current legal, economic and social conflict can be resolved. Most assuredly, this unresolved clash between federal and state judicial systems and between economic and social interests cannot be permitted to continue. Too much is at stake in all areas.

Puget Sound Gillnetters Assn. v. Moos, supra, at 698.

C. The decisions of the United States District Court and the United States Court of Appeals for the Ninth Circuit conflict with prior decisions of this Court interpreting the treaties in question.

This Court has considered the same treaty language on several occasions. In *United States v. Winans*, 198 U.S. 371, a private landowner could not prohibit access by a treaty Indian to his usual and accustomed grounds and stations. The treaty lanuage, while guaranteeing access to the usual and accustomed fishing places, did not prohibit the state from nondiscriminatory regulation:

> "Nor does it (the treaty) restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised."

Winans, supra, at 384.

Subsequently in *Tulee v. Washington*, 315 U.S. 681 (1942), while holding that a treaty Indian could not be compelled to pay a general revenue license fee in order to exercise his treaty-protected right to fish, this court reasserted:

> * * * the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish.

Tulee, supra, at 684.

Nondiscriminatory state regulation of fishing activities, including those by treaty Indians, was again approved in *Puyallup Tribe v. Department of Game,* 391 U.S. 392 (1968) (*Puyallup I*):

> "The manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."

Supra, at 398, and

> * * * any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase "in common with" * * *

Supra, at 403.

In *Puyallup III, supra* (footnote 16), this Court recognized that all citizens of Washington, both Indian and non-Indian, have fishing rights. Since Indians and non-Indians have common

rights, it should follow that *neither* group may be discriminated against in regulating fishing.

The federal Court's orders are inconsistent with the above decisions.[10] The district court has mandated a pattern of regulation which discriminates between Indian and non-Indian net fishermen, limiting or prohibiting fishing by the non-Indians while expressly permitting fishing by Indian fishermen.

As we have shown, this Court has consistently upheld the applicability of the state's nondiscriminatory regulation to treaty Indian fishing. Yet the "Washington fishery case" orders remove the Indian fishery harvest from the state's jurisdiction. (See Memorandum Order and Preliminary Injunction, pp. 17-18, entitled "Removal of Treaty Allocation from State Exercise of Jurisdiction," (App. 54-57) and paragraph K prohibiting the application of conservation measures to Indians where the nontreaty share decreed by the District Court has been exceeded. (App. 59).

The United States District Court has also continued to include within the fish allocation those fish propagated by the hatchery systems of the State of Washington. Such inclusion is in conflict with the concurring opinion in *Puyallup*

[10]The district court made the following reference to the court's decision in *Puyallup I, supra*: "If the seeming nonsequitur be the law, it certainly is deserving of more specific legal analysis and justifications than it has ever had in any United States Supreme Court decision." *United States v. Washington,* 384 F.Supp. 312 at 337 (1974).

II, supra, wherein three justices of this Court clearly indicated that the treaty right does not extend to hatchery fish. 414 U.S. at 49. It is also in conflict with the implementation of *Puyallup II* in *Puyallup III* in which the allocation excluded hatchery fish.

D. The Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceedings.

Based upon the 50% ruling,[11] the federal district court has adopted extraordinary measures including:

1. Removing the state from its traditional role as manager and regulator of its fisheries.

2. Enjoining state courts from proceeding with any actions filed with them which might affect the federal district court's implementation of its treaty interpretation.

3. Enjoining all (nonparty) citizens of the state from commercial net fishing unless authorized by orders of the federal district court. This approval is granted only through a recorded telephone message. Only treaty Indians are exempt.

4. Interferring in the regulatory system of an international Commission established by a treaty between this Nation and Canada (which treaty also gave the word of this nation to enforce compliance with IPSFC regulations.)

[11]Characterized by the circuit court as a discretionary determination.

5. Three years after the judgment in the original action, the court amended its decree to expand the case area to apply the same special Indian allocations to areas which were neither within the pretrial pleadings nor the post-trial, but pre-judgment, relief requested.

The number of extraordinary rulings, modifications, and even orders granted without hearing, are too numerous to list. We will, in the interest of brevity, only discuss one of the foregoing list: removal of the state as the traditional manager of the fishery resource.

The district court adopted a Salmon Management Plan (App. 61-77) which was appealed to, but not discussed by, the circuit court of appeals in the Washington fishery case, supra. That Plan included, but was not limited to (1) requiring state agencies to obtain agreement from the tribes for fishery enhancement planning including where facilities will be constructed and where fish would be planted from the hatchery program. (App. 68); (2) requiring agreements with tribes as to escapement goals. This is, fish available for spawning; (3) providing that where the court's allocation is not achieved it is to be made up in following years; and (4) a previously established Fisheries Advisory Board composed of one representative of the state, one from the tribes, and the court's "fishery expert" shall resolve disputes on subjects addressed by the plan (which encompasses nearly all elements of sal-

mon management). The order provides "No party may object to the jurisdiction of the board as to matters addressed by this plan." (App. 76).

Thus, the court has not only taken control and management of the salmon resources from the agency lawfully charged with that function but has established a nonjudicial body to which much of that authority has been delegated.

E. International Fisheries Case

The IPSFC (International Fishery) case is so extraordinary, it deserves separate discussion. The original decision of the district court and circuit court appeared to recognize that the IPSFC Convention (50 Stat. 1355), implementing federal statutes (16 USC 776) and IPSFC regulations all took precedence over any special rights the Indians might enjoy under the treaties in question. The district court observed:

> * * * this court believes that treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission must comply with regulations of the Commission.

United States v. Washington, supra, 384 F.Supp. at 411.

and the circuit court declared:

> Congress sufficiently indicated its intent that all persons, including Indians, be subject to Commission regulation.

United States v. Washington, supra, 520 F.2d at 690.

The state petitioners in *United States v. Washington, supra,* (#75-588) indicated to this Court concern that the federal court actions would interfere with IPSFC regulation.

In response, the United States assured this Court that there was no problem with the IPSFC fishery:

> The decision below presents no issue regarding that Convention requiring further review. Both the district court (384 F.Supp. at 411) and the court of appeals (Pet. App. 49-50) specifically held that all persons, including treaty protected Indians, are subject to the regulations of the IPSFC. Thus there is no question of the decree impinging upon the authority of the IPSFC.
>
> * * * As we have demonstrated, both courts below specifically recognized the supremacy of IPSFC regulations. If any subsequent actions interfere with the regulations of the commission they are not sanctioned by the decision under review.

Brief of the United States in Opposition (to petition for writ of certiorari) in *United States v. Washington,* Nos. 75-588, pp. 21-22.

Notwithstanding those assurances, the United States and some of the tribes moved the district court for orders establishing special Indian fisheries in violation of the then existing IPSFC regulations and for orders specifically applying the 50% allocation to the United States' share of the IPSFC harvest. The relief was granted, permitting fisheries by Indians on IPSFC stocks at times and in manners prohib-

ited by IPSFC regulations and Indian fisheries during periods closed by IPSFC regulations.[12] Specific findings and conclusions were entered that Indians are entitled to 50% of the United States' share.[13]

> The Stevens treaties between the United States and the various Indian tribes, as interpreted by this Court and the Ninth Circuit Court of Appeals, preempted State control of fishing within Washington territorial waters in Puget Sound, including Fraser River sockeye and pink salmon, and made it the supreme law of the land that the Indians must be allowed the opportunity to take up to fifty per cent of the fish that may be legally harvested in Washington territorial waters.

Conclusion of Law 63 from the Order proposed by the United States and signed by the district court.

This constitutes a reversal of position by the United States and the district court. It conflicts with the prior assurances made by the United States to this Court.

Not only has the district court changed its decision but in doing so has acted in excess of

[12]The Indians allowed to fish included those from at least one tribe without established usual and accustomed fishing areas in IPSFC waters.

[13]This allocation did not take into account the factors this court indicated were relevant in *Puyallup II, supra*. The district court made a finding that Indians would fish 108 vessels and non-Indians had fished 1,466 vessels in IPSFC waters. If the Indians had taken 50% and the run had been as predicted, the average Indian boat catch would have been nearly 18,000 salmon which would have a value of nearly $100,000. The runs, however, were smaller than predicted. The Indians did not catch the share alloted.

its jurisdiction in interferring with the affairs of the International Commission.[14]

The district court here was consciously interfering in the decision-making process of the Commission. The court included several stays in a series of orders to give time to persuade the IPSFC to change its regulations. The court directed the petitioner, Director of Fisheries, in his capacity as an International Commissioner, to "promptly take action, whatever seems appropriate in the occasion, to press the matter before the Commission." (Transcript of 11 July, quoting the judge.)

Similarly, the court, when ordering that one tribe be allowed to disregard Commission closures as implemented by state regulations, delayed the entry of the order so the state could ask the IPSFC to permit such a fishery (TR 6 August, pp. 130, 133-34). After the IPSFC refused, the court entered the order (App. 125-27).

The district court's interference with the regulations of the IPSFC did have international

[14]See: *Z & F Assets Realization Corp. v. Hull*, 311 U.S. 470 (1941) wherein this Court rejected an indirect attempt to interfere with an international commission created by treaty between the United States and Germany to rule upon war claims by United States citizens. Justice Black stated:

> And the fact that petitions sought to challenge the Commission's power by proceedings against the Secretaries of State and the Treasury, and not by direct suit against the Commission, is immaterial. If petitioners cannot directly attack the Commission in the courts, neither can they, in the absence of congressional consent, assail the propriety of its awards through the expedient of suits against others charged with responsibility for executing the final determination of the Commission.

Supra, at 491.

ramifications.

Two protests to the Secretary of State were filed by the International Commission (Joint Exhibit 10, Joint Exhibit 11). An objecting letter from the government of Canada to the government of the United States was also sent. (It was agreed by the United States that this letter would be provided as an exhibit. Transcript of 6 August 1975, p. 10-11. It was never provided.)

One state department official advised the court by affidavit that the State Department had declined to implement one portion of the court's order:

> No action was taken * * * with regard to the further provision pertaining to a five day fishery, since the Department of State concluded that provision was contrary to the United States obligation and policies under the Salmon Convention in that it was inconsistent with the basic regulatory scheme elaborated by the Commission.

The injunction was then amended to delete this five-day fishery. However, the conclusion is inescapable that the order of the district court was involving that court impermissibly in international relations and violating United States obligations.

Additionally Donald L. McKernan, who headed the United States' delegation in bilateral negotiations with Canada as Chief Negotiator, testified as to possible disruption of the regulatory system of the IPSFC (Transcript of 11 July, 1975, p. 136).

When asked whether such disruption of the IPSFC could cause problems in the international negotiations with Canada (which extended to all shared fisheries, not just those under the IPSFC), his answer was "yes." (Transcript of 11 July 1975, p. 137).

Even if the Indian treaties mandate a special allocation of fish, the IPSFC treaty and implementing statutes have superseded the requirement of such an allocation on fisheries which are subject to the jurisdiction of the IPSFC.

There is no doubt Congress has that authority. *Menominee Tribe v. United States,* 391 U.S. 404, 412 (1965); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-67 (1903). The existence of the Indian treaties were known to Congress when the IPSFC treaties were approved and the implementing statutes passed.

The treaty with Canada obligates the United States to enforce "Commission" regulations against "every national or inhabitant, vessel or boat * * * that engages in fishing." (Convention, Article IX, App. 145). No exception is provided for Indians. The implementing federal legislation makes it unlawful for "any person to engage in fishing for sockeye salmon or pink salmon in convention waters in violation * * * of any regulation of the Commission." (16 USC # 776, App. 160). Again, there is no exemption for Indians.

The IPSFC treaty and implementing statutes were passed nearly forty years before the federal district court's determination that the Indian trety language mandated 50% of the fish runs.

The interpretation urged here, that treaty Indians are fully subject to IPSFC regulation and are not entitled to a special fishery but may participate pursuant to those nondiscriminatory IPSFC regulations, was the interpretation of all parties until the actions of the federal district court in 1975.

It is necessary to answer the Court of Appeals conclusion that the matters relating to the IPSFC concern only the 1975 season and therefore the appeals are moot:

> The 1975 season has now passed and neither the order of the United States District Court nor that of the state court has current force.

(*International Fisheries* case, *supra*, at 1121.) (App. 29-33).

These questions are not moot. The important aspects of the district court's orders as they relate to the IPSFC are still in effect. The decision that Indians are entitled to 50% of the United States' share and the requirement petitioner Fisheries Director work toward implementation in his capacity as a United States IPSFC Commissioner continues effective. A letter of instruction was sent from United States State Department to the United States Commissioners. That

letter of instructions is reprinted in the Appendix 168-69. It notes United States regulatory recommendations:

> * * * with the aim of accommodating the *United States v. Washington* decision regarding Indian treaty rights * * * You are instructed to support it at the next Commission meeting and vote for its adoption into final regulations for 1977.

Further, the tribe allowed a special exemption from state regulations implementing IPSFC regulations still claims that exemption. (Other tribes have now asserted they enjoy the same exemption.)

The United States Department of Interior has adopted regulations providing for special treaty Indian fisheries in IPSFC waters. 25 CFR 256 (B) found in Federal Register, Vol. 43, # 122, Friday, June 23, 1978.

The express purpose recited therein is to implement treaty fishing rights *"affirmed in United States v. Washington."*

Clearly the International Fishery decision continues to be effective, though implementation has taken different forms from year to year.

CONCLUSION

The Petitioner State of Washington finds itself in the extraordinary position of being confronted with conflicting decrees by the highest state appellate court and the lower federal courts with reference to fishing by treaty Indians. This conflict can only be resolved by this Court.

The lower federal court decisions have, some 120 years after the execution of the treaties, concluded for the first time that the fishery resource in the State of Washington is to be divided "equally" between treaty fishermen and non-treaty fishermen. The implementation of this extraordinary ruling has been transformed by the district court to a guarantee of specific numbers of fish by species and areas for Indian fishermen.

The implementation of this decision has had an adverse impact upon the citizens of the state and the basic authority of the state to manage and conserve its fishery resources. The court's unprecedented expansion of Indian jurisdiction involving such concepts as self-regulating tribes beyond the boundaries of the reservations and the interference with the International Fisheries Commission, even individually, would justify the exercise of jurisdiction by this Court. The collective impact of these decisions literally demands review by this Court.

We, therefore, respectfully submit that the application for Writ of Certiorari be granted.

DATED this 20th day of July, 1978.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PUGET SOUND GILLNETTERS ASSOCIATION et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent,

United States of America et al., Real Parties in Interest,

COLUMBIA RIVER FISHERMEN'S PROTECTIVE UNION, INC., et al.,
Petitioners-Appellants,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,
Respondent,

and

United States of America et al., Real Parties in Interest,
Appellees.

UNITED STATES OF AMERICA et al.,
Plaintiffs-Appellees,

v.

STATE OF WASHINGTON et al.,
Defendants-Appellants.

Nos. 77-3129, 77-3208, 77-3209, 77-3654 and 77-3655.

United States Court of Appeals
Ninth Circuit.

April 24, 1978.

Before GOODWIN, WALLACE, and KENNEDY, Circuit Judges.

GOODWIN, Circuit Judge:

These consolidated appeals are the latest in a series of efforts by agencies of the State of Washington and various associations of non-Indian fish catchers to overturn decisions of the District Courts of Oregon and of the Western District of Washington apportioning between treaty Indians and others the right to take fish. *See United States v. Washington,* 384 F.Supp. 312 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976); *Sohappy v. Smith,* 302 F.Supp. 899 (D.Or.1969); *United States v. Oregon,* 529 F.2d 570 (9th Cir. 1976). The geographic areas coverd by these appeals are Puget Sound, the Washington coast south to and including Gray's Harbor, and the Columbia River.

I BACKGROUND

Litigants reached an agreement concerning the Columbia River, and that agreement was incorporated in a final decree of the District Court, Order of February 28, 1977, *United States v. Oregon.* That case retains minor problems of enforcement.

Agencies of the State of Washington and various of its constituencies continue to attack the judgment in *United States v. Washington.* Accordingly, we will again set forth the treaty basis of that decision and reaffirm its validity. The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases (*see Morgan v. Kerrigan,* 530 F.2d 401 (1st Cir.), *cert. denied sub nom. McDonough v. Morgan,* 426 U.S. 935, 96 S.Ct. 2649, 49 L.Ed.2d 386 (1976); *Morgan v. McDonough,* 540 F.2d 527 (1st Cir. 1976), *cert. denied,* 429 U.S. 1042, 97 S.Ct. 743, 50 L.Ed.2d 755 (1977)), the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.

When Europeans first came to the Northwest, they found it occupied by many bands of Indians, who together exercised superficial control over the entire territory. The Indians knew nothing of English land tenure, by they were destined to learn.

For most tribes living along Puget Sound, the Pacific Coast, or a major stream, the yearly runs of anadromous fish were central to their economies and their cultures. As settlement from the East increased

during the 1840's and 1850's, the white settlers created political pressure to limit Indian occupation to designated lands so that more land would be available to the settlers for enclosure and exclusive possession. Under instructions from the federal government, Governor Isaac Stevens of Washington Territory negotiated a series of treaties in 1854-55 to achieve settlement goals.

The treaties followed a pattern, the Treaty of Medicine Creek, 10 Stat. 1132 (1854) being typical. In article II the Indians reserved to themselves certain lands for reservations, and in article III the government further guaranteed them the right to continue taking fish at their usual and accustomed sites off the reservation, in common with all citizens of the Territory. This court has previously construed these clauses in earlier chapters of this litigation. We held that article II reserved an exclusive right to fish on the reservation and that article III established something analogous to a cotenancy, with the tribes as one cotenant and all citizens of the Territory (and later of the state) as the other. *United States v. Washington,* 520 F.2d at 685, 690. It is crucial to remember that these treaties did not grant the tribes anything; rather, the tribes granted the United States a vast expanse of land, reserving to themselves certain interests in it and in its profits a prendre.[1]

[1]This reservation included customary uses outside the area ceded. *See Seufert Brothers Co. v. United States,* 249 U.S. 194, 39 S.Ct. 203, 63 L.Ed. 555 (1919).

The negotiations and treaties show that the right to take fish was to the Indians one of the most important rights reserved.

The Supreme Court has recently indicated that tribal sovereignty continues as a necessary part of Indian law. In *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), it overturned a state tax on income earned by a reservation Indian from reservation sources. In doing so it noted that tribal sovereignty provides a backdrop against which treaties and statutes must be read. The Indian claim to sovereignty long predates that of the United States or of any state. Indians on reservations remain a separate people, exempted from many laws of the state within whose borders they live. 411 U.S. at 172-73, 93 S.Ct. 1257. In *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), the Court upheld a hiring preference for Indians in Bureau of Indian Affairs positions. It noted that the preference was political, not racial, 417 U.S. at 553 n.24, 94 S.Ct. 2474 given to "members of quasi-sovereign tribal entities," 417 U.S. at 554, 94 S.Ct. at 2484. In *United*

[2]It is questionable whether Anglo-American concepts of sovereignty existed in these Indian cultures, or whether the collections of villages Governor Stevens made for purposes of his negotiations were in fact tribes. The United States treated them as tribes, however. The villages were then exercising and the tribes have since exercised what we would consider sovereign powers over their members and territories. These concepts have become basic to the legal justification for preserving the tribes as legal and cultural entities, a goal which the treaties were intended to serve and which Congress has recently reaffirmed. Indian Self-Determination Act of 1975, Pub.L. 93-638, Title I, 88 Stat. 2203, 2206. We will therefore use these concepts, recognizing that in doing so we may not be perfectly adapting Western legal concepts to Indian culture.

States v. Mazurie, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975), the Court upheld the power of Congress to delegate to an Indian tribe the right to regulate the sale of liquor on non-Indian land within an Indian reservation. The Court specifically rejected the Tenth Circuit's holding that Indian tribes are simply voluntary associations of private citizens, citing *Worcester* and *McClanahan* among other cases. 419 U.S. at 557, 95 S.Ct. 710.

Most recently, the Court held unanimously that a conviction by a tribal court does not bar federal prosecution for the same offense, because the tribal and federal courts are arms of different sovereigns. "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler,* — U.S. —, —, 98 S.Ct. 1079, 1086, 54 L.Ed. — (1978).

II EQUAL PROTECTION

The state and the non-Indian fish catchers argue that to treat Indian fish catchers differently from non-Indians in allocating fishing opportunities and determining fishing regulations is a patent violation of basic equal protection principles. The Washington state courts have accepted this argument. *See Washington State Commercial Passenger Fishing Vessel Association v. Tollefson,* 89 Wash.2d 276, 571 P.2d 1373 (1977). Yet the most obvious conclusion

from this background is that "equal protection" is an issue in this case only as it limits the state's regulation of Indian fishing in those areas where the state has a right to regulate. Comparisons between the numbers of treaty and nontreaty fishers, or the quantity of fish each category has an opportunity to take, are simply irrelevant under the law. The treaty tribes reserved their preexisting rights to fish, and they continue, as quasi-sovereign entities, to hold those reserved rights.

As we pointed out in *United States v. Washington,* 520 F.2d at 685, the treaties established something analogous to a cotenancy in the off-reservation fishery.[3] The treaty fishers derive their rights from one of the cotenants, the tribes. The nontreaty fishers derive their rights from the other, the state as the successor to the United States. The population-head-count disparity is the unremarkable result of normal principles of property law applied to changing numbers within cotenant classes.

[3]We refer to the cotenancy analogy only because it is helpful in explaining the rights of the parties, not because all the rights and incidents of a common law cotenancy necessarily follow. The shared interest is in a yearly run which is apportioned on a yearly basis between two parties, each having equal rights in it. It is this equality of right between two quasi-sovereigns which we expressed by analogy in the earlier case. Obviously, not all the rules of cotenancy in land can apply to an interest of the nature of a profit. Another analogy might have been drawn to the doctrine of equitable apportionment between states claiming the yearly flow of a common stream. The Supreme Court has often resolved the conflicting claims of quasi-sovereign states in this context. *Nebraska v. Wyoming,* 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815 (1945); *Wyoming v. Colorado,* 259 U.S. 419, 42 S.Ct. 552, 66 L.Ed. 999 (1922). Similar principles might apply here with the addition, of course, of the equality of rights which the treaties guarantee. The primary point is that the state and the tribes stand in similar positions as holders of quasi-sovereign rights in the fishery, and that the federal courts are, when necessary, the arbiters of those rights.

Treaty fishers fish under the regulation of one quasi-sovereign, nontreaty fishers under the regulation of another. The rights of each sovereign are reserved or granted in the treaties, as the district court and this court have authoritatively construed them. These principles, applied in good faith, should answer most of the state's arguments; the problem is then one of enforcement.

These rights were reserved, not by the individuals who happened to be alive in 1854 or 1855, but by tribes, with which the United States treated as sovereign entities.[2] *See United States v. Washington,* 520 F.2d at 688. The sovereignty of Indian tribes was the legal foundation for the relations between the United States and the Indians from the origins of this country, even though tribal sovereignty was viewed as the limited sovereignty of a domestic dependent nation. Under the Constitution, only the United States may deal with an Indian tribe. *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17-19 (1831); *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 557-60 (1832). All Indians are now citizens of the United States, 8 U.S.C. § 1401(a)(2), and the United States has not made treaties with the tribes since 1871, 25 U.S.C. §71. As we noted in *United States v. Washington,* 520 F.2d at 685, tribal sovereignty does not fully explain current Indian status. Yet, as we also noted there, the concept of tribal sovereignty remains necessary to explain the extent of the tribes' reserved rights under the

treaties, which have not been affected by the changes.

III ENFORCEMENT

A

Enforcement is a problem because the state, its courts, and the non-Indian fishers have never fully accepted the principle that treaty rights can be claimed by a politically impotent minority. Before 1977 the state enforced the district court's orders grudgingly at best.[4] The current crisis is the result of a breakdown in state law enforcement in 1977. The state agencies had, with well-publicized reluctance, issued fishing regulations which, if enforced, would have met the district court's requirements. The agencies found, however, that some state prosecutors refused, again with the vocal approval of their constituents, to prosecute violations of the regulations in the few instances where the state issued citations. More important, the Washington Supreme Court in a recent series of decisions attempted to strip the state agencies of their power to comply with the district court's orders.

In *Puget Sound Gillnetters Association v. Moos,* 88 Wash.2d 677, 565 P.2d 1151 (1977), and *Purse Seine Vessel Owners Association v. Moos,* 88 Wash.2d 799, 567 P.2d 205 (1977), the Court held certain regulations which the state Department of

[4]Judge Burns pointed out this recalcitrance in his concurrence in *United States v. Washington,* 520 F.2d 676, 693 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976).

Fisheries issued to comply with the district court's orders to be beyond the Department's authority under state law.[5] The Department thereupon withdrew its regulations and issued new ones which made no attempt to protect tribal rights in the fishery. This situation led the district court to cease its attempts to work through the state government and, instead, to undertake fishery management directly. The Court's enforcement actions are the special focus of the present appeal.

The tribes have a right to the enforcement of the treaties. This court has previously upheld the district court's construction of those treaties. The state was a party to that construction and remains a party now. The state is bound by the previous decisions.

The district court might have required the state to comply with its orders despite the conflicting state court rulings, but a direct confrontation would have raised serious questions of federalism. In an effort

[5]In those cases, and in *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson*, 89 Wash.2d 276, 571 P.2d 1373 (1977), the court construed the treaties as simply guaranteeing tribal Indians equal treatment with other citizens and stated that the district court's actions had created a class based on an impermissible racial classification. We reject these positions for the reasons given above and in Justices Horowitz' and Utter's dissents. We assume that the Washington court has unwittingly misconstrued the basic concepts of Indian law and failed to understand a long line of Supreme Court decisions beginning with *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905).

This misconstruction of Indian law was one basis for the Washington court's denial of state authority to allocate fish between treaty and nontreaty fishers. The state court thought that such an allocation would violate equal protection, something the state could not be required to do. We question whether the court would continue to deny state agencies the authority to allocate under a correct view of tribal status and rights.

to minimize friction in a delicate state-federal situation without denying the tribes the rights they had reserved in the treaties and vindicated in court, the district court entered into the direct management of the fishery. Unless or until Congress acts to harmonize state and treaty interests in the fishery, the default of state government leaves the district court as the only instrument available to vindicate the treaty rights.

The pertinent questions, therefore, are not whether the court was right or wrong in 1974, but whether the court's actions are reasonable now. A subsidiary question is whether the court may enforce its orders against "nonparty" fishers directly.

B

We held in *United States v. Washington*, 520 F.2d at 687-90, that the district court had discretion in its allocation of the fishery; we now extend that holding to recognize its broad discretion in managing the fishery. Further, none of the district court's actions now before us constitutes an abuse of that discretion.

The district court's orders set forth an allocation of fishing opportunity[6] between the treaty and nontreaty fishers intended, for 1977 only, to provide

[6]The appellants argue that the district court attempted to transfer title in the fish to the tribes although fish in their wild state are incapable of being owned. This was not the district court's order. Considered in light of the record as a whole, the orders allocate only the opportunity to take fish. That allocation can best be expressed and enforced, of course, by numbers of fish taken.

nontreaty fishers with 55% of the total opportunity and treaty fishers with 45%. Because the district court included the amount taken in close-in ocean waters in the estimate of the total opportunity available to nontreaty fishers, the allocations generally pushed upward the opportunity in Puget Sound and the coastal streams for treaty fishers.[7] The difference in technology between white and Indian fishers is explained in *United States v. Washington,* and in the voluminous record here. The district court made its allocation orders upon the best technical advice available. It made its orders binding upon fishers' associations and upon all persons fishing under the authority of the State of Washington.

We have noted that the appellants argue that the district court's actions violate equal protection. The allocation is not an allocation among an indistinguishable mass of citizens but between two groups of persons each claiming undivided half-interests in a quasi-cotenancy. Each of the co-owners, the state and the tribes, is a quasi-sovereign, and the distinction between their members is thus political rather than racial. Ethnic origin is relevant only to the degree it happens to define tribal, and therefore political, status. An ethnic Indian who is not a member of a tribe with reserved fishing rights is in the same position with respect to Washington fish

[7]There is a small tribal ocean fishery, and the parties do not agree whether it is included in the tribal share. If it is not now included, we presume the district court would include it on a proper showing.

and game laws as any other citizen of the state.

We find no abuse of discretion in the district court's orders allocating the opportunity to take fish. The circumstances compelled the court to intervene in fisheries management, and the state does not appear to quarrel seriously with the specific allocations.[8] Indeed, we do not see how, given the state's inability or unwillingness to act, the district court could have protected tribal rights without making orders allocating fish in some manner. The numbers question is one of degree, not one of principle. Fish reach the tribal fishery after passing through the areas of heaviest nontribal fishing. The technology of commercial salmon fishing favors the nontribal fisher. If the nontribal fishery were not limited, the tribal fishery would never have the opportunity to take its full share, particularly in light of the need to provide an escapement of fish sufficient to preserve the run. Preserving the tribal opportunity requires limiting the nontribal opportunity.[9] In restating this obvious truth, we are

[8]The appellants do question the district court's limitation only of commercial fishing. Such a limitation may be the most practical way to enforce the district court's orders. The state can always propose limitations effective against both sport and commercial fishers if it can give reasonable assurances that such limitations would be enforceable. If the state were able and willing to regulate its fishery in a way consistent with the district court's orders, of course, the sport/commercial fishery issue would be entirely a state concern so long as tribal fishers had an opportunity to take their treaty shares.

[9]Appellants urge that the treaties are not self-executing but require Congressional action to be effective. The treaties specifically reserved rights to the tribes and gave federal guarantees of those rights; we do not know what more would be necessary to make the treaties effective and enforceable in federal court as the supreme law of the land. *See United States v. Washington,* 520 F.2d at 684.

not unmindful of the equities that lie on the side of the State of Washington. Its hatcheries help produce fish that will be caught by Indians as well as by non-Indians. But these equities call for state, federal, and tribal cooperation. They do not justify an attitude of total intransigence.

IV GRAY'S HARBOR

Because of uncertainty over whether the Quinault tribe would continue as a plaintiff in the earlier litigation, the original pretrial order defined the case area to include only coastal streams north of the Gray's Harbor watershed. This area includes the Quinault reservation and several off-reservation streams which are usual and accustomed locations for Quinault fishers. There was evidence at the trial concerning Quinault fishing in Gray's Harbor as well as within the case area. The court found that Quinault Indians had important fisheries, shared with other tribes, in Gray's Harbor and its tributaries, although it did not specifically find them to be usual and accustomed fishing places. 384 F.Supp. at 374-75. In 1974, in response to a motion by the state, the court held that the Quinault tribe had usual and accustomed fishing places in the Gray's Harbor area and that nothing in its previous decisions prevented them from using those places. The state filed a notice of appeal from this ruling, but the appeal apparently lapsed for want of prosecution.

Since the district court's original decision the Quinault tribe has been actively developing its Gray's Harbor fishery, both by increasing its fishing capacity and by managing the run to produce more fish. The state's actions in response to the state court decisions threatened the continuance of this Indian fishery, and the district court's order and injunction of August 10, 1977, as interpreted on August 12, excluded Gray's Harbor fishing from its protection. In response to this situation, the Quinault tribe, with the support of the United States, asked the district court to extend the case area to cover Gray's Harbor. The court agreed to the request. After a series of hearings the court allocated the opportunity to take fish between the treaty and nontreaty fishers in a fashion similar to its other allocations.

One question on appeal is whether the district court had the authority to expand the case area beyond that defined in the pretrial order and in its original decree; Gray's Harbor was included in the original complaint. The United States argues that the district court simply extended its decree, without modification, to cover a new area. We cannot agree with this statement. In its conclusion of law number 7, 384 F.Supp at 400, the court explicitly excluded Gray's Harbor from the case area. To change the case area requires changing this conclusion of law. Since the decree depends on the conclusions of law, such a change would be a modification of the decree.

The state suggests that the tribe's request may

be a motion to modify the decree under Fed.R.Civ.P. 60(b). Rule 60(b), however, deals with relief from judgments, not modification at the prevailing party's request to extend the judgment's scope.

The best interpretation of the district court's order is that it is a supplemental decree based on a modification of the pretrial order to conform to the evidence presented at the trial. Under Fed.R.Civ.P. 15(b), the pleadings may be amended, even after judgment, to conform to the evidence. The same standard should be applied to the modification of a pretrial order under Rule 16 in these circumstances. 3 Moore's Federal Practice ¶15.13[1]. We have previously upheld a district judge who applied Rule 15(b) standards to amend a pretrial order to conform to the proof, *Gsell v. Adams,* 316 F.Supp. 394 (D.Or.1969), *aff'd,* 431 F.2d 1204 (9th Cir. 1970), and one whose holding was based on a theory which had evidentiary support and was argued but which was not in the pleadings or the pretrial order, *Dering v. Williams,* 378 F.2d 417 (9th Cir. 1967).[10] Here the parties tried the issue of Quinault off-reservation fishing without objection. The trial court found that Quinault Indians traditionally used Gray's Harbor and its watershed for their fishing; its failure to use

[10]Other circuits have reached similar conclusions. In *Monod v. Futura, Inc.,* 415 F.2d 1170 (10th Cir. 1969), the court in dictum stated that Rule 15(b) standards apply to a postjudgment amendment of a pretrial order if the issue has been tried without objection. The Sixth Circuit agrees, if the parties understood that the evidence was directed to the unpleaded issue. *MBI Motor Company, Inc. v. Lotus/East, Inc.,* 506 F.2d 709 (6th Cir. 1974). The Fifth Circuit points out that in these circumstances allowing the amendment is mandatory. *Wallin v. Fuller,* 476 F.2d 1204 (5th Cir. 1973).

the treaty words "usual and accustomed fishing places" was the result of the exclusion of Gray's Harbor from the case area of the original decree. When the state asked the court to limit Quinault fishing in Gray's Harbor, the court specifically found that the Quinault tribe had usual and accustomed locations there; the state failed to pursue its appeal from this finding.[11]

In the light of these circumstances, we will treat the court's order expanding the case area as a supplemental decree based on an implied modification of the pretrial order to conform it to the evidence actually presented.[12] (The court retained continuing jurisdiction to enter further decrees.) As a supplemental decree, the order is appropriate. Some action was necessary to protect Quinault treaty rights in Gray's Harbor. The alternative to the supplemental decree would have been to bring a separate action, which the court would undoubtedly have consolidated with this action. The evidence and parties were such that the state would probably have been collaterally estopped to deny most of the necessary facts; the court could certainly have issued a temporary restraining order or preliminary

[11]The fact that Gray's Harbor is outside the area ceded is irrelevant if Quinault Indians customarily fished there. *Seufert Brothers Company v. United States,* 249 U.S. 194, 39 S.Ct. 203, 63 L.Ed. 555 (1919).

[12]No one suggests a need for the trial court to go back and amend the pretrial order if we can say on appeal that it would have been justified in doing so. *Dering v. Williams,* 378 F.2d 417 (9th Cir. 1967). An appellate court may uphold a judgment on any theory which finds support on the record even though the lower court relied upon a wrong ground or gave a wrong reason. *Jurinko v. Edwin L. Wiegand Company,* 477 F.2d 1038 (3d Cir.), *vacated on other grounds,* 414 U.S. 970, 94 S.Ct. 293, 38 L.Ed.2d 214 (1973).

injunction with little extra delay. The court did hold factual hearings before making its allocations of fishing opportunity. The only result of requiring a separate action would have been to add further complexity to an already complex case.[13]

V BINDING NONPARTIES

Several of the district court's orders were directed to individual fishers and to fishers' associations, although these persons and associations were not parties to the litigation. The fishers argue that the court was therefore without jurisdiction over them. The United States suggests several theories which would support the district court's actions. Without ruling on the other theories, we agree that the fishers are bound because they are in privity with the state, which is a party. Wild animals and fish belong to the people of a state as a whole in their sovereign capacity, and the state may regulate the manner of their taking or prohibit it entirely. *Geer v. Connecticut,* 161 U.S. 519, 527-30, 16 S.Ct. 600, 40 L.Ed. 793 (1896).[14]

[13]The state's only objection to the specific allocations seems to be based on the equal protection argument which we rejected above. We thus have no occasion to decide whether the allocations were within the district court's discretion.

[14]*Douglas v. Seacoast Products, Inc.* 431 U.S. 265, 284-85, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977), simply holds that a state does not have title to its fish to the extent that it can give its citizens rights superior to those of citizens of other states who hold a federal fishing license. This holding does not deny the state's substantial interest in fish or that its claim to them, as a sovereign, represents the claim of all its citizens. *See* Justice Rehnquist's opinion in *Douglas,* 431 U.S. at 287-88, 97 S.Ct. 1740.

Both Oregon and Washington hold that fish within their borders, so far as title can be asserted, belong to the state in its sovereign capacity in trust for its people. *Anthony v. Veatch,* 189 Or. 462, 474-75, 486-87, 220 P.2d 493, 498-99, 503-04, *rehearing denied,* 189 Or. 504, 221 P.2d 575 (1950); *Columbia River Fishermen's Protective Union v. City of St. Helens,* 160 Or. 654, 661, 87 P.2d 195, 198 (1939); *Monroe v. Withycombe,* 84 Or. 328, 334-35, 165 P. 227, 229 (1917); *Washington Kelpers Association v. State,* 81 Wash.2d 410, 414-415, 502 P.2d 1170, 1172-73 (1972), *cert. denied,* 411 U.S. 982, 93 S.Ct. 2274, 36 L.Ed.2d 959 (1973); *State ex rel. Bacich v. Huse,* 187 Wash. 75, 79-80, 59 P.2d 1101, 1103-04 (1936). The Washington Supreme Court has recently specifically held that fishers have no private property rights in taking salmon. "In regulating the fisheries, the state is merely enacting legislation concerning its own property and prescribing the methods which may be used in acquiring it by private persons." *Washington Kelpers Association v. State,* 81 Wash. at 415, 502 P.2d at 1173. While the quoted statement of state ownership may be too strong, it shows that under Washington law the citizen's right to take fish is purely derivative of the state's power to regulate rights in the fish. The fishers' interest is therefore derivative of the state's interest; the fishers are in privity with the state and are bound by actions affecting its sovereign interests to which it is a party. *City of Tacoma v. Taxpayers of Tacoma,* 357 U.S.

320, 340-41, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958); *Wyoming v. Colorado*, 286 U.S. 494, 506-09, 52 S.Ct. 621, 76 L.Ed. 1245 (1932).[15] This being the case, the district court had authority to act against the fishers directly when it appeared that the state was unable to do so. Since the fishers are bound by the district court's actions, they may not collaterally attack them now, and they are subject to penalties for contempt if they have actual knowledge of the court's orders and violate them.[16] Any complaints the fishers may have concerning the state's representation of their interests are matters between them and the state. Indeed, much of the difficulty in this case is the direct result of the pressure these same fishers have brought to bear upon the state government.

The district court's injunction against state court action was both necessary and proper. The state trial court sought to require the Department of Fisheries to authorize a harvest of fish without

[15]The United States and the tribes cite *Wyoming v. Colorado* and several other water law cases in their brief. We agree with them that this is the most nearly analogous area of the law. States litigate their quasi-sovereign rights to water, and appropriators under the states' laws are bound by those decisions without being parties. *Nebraska v. Wyoming*, 295 U.S. 40, 43, 55 S.Ct. 568, 79 L.Ed. 1289 (1935). Washington's fishers are its privies in litigation over the state's quasi-sovereign right to its fish in the same way that Wyoming's appropriators are its privies in litigation over the state's quasi-sovereign right to water.

[16]The appellants make a number of technical attacks on the injunctions. We find them to be without merit. In the context of all the proceedings in this case, the state and the fishers knew what was being enjoined. The use of a telephone hot line for daily information on fisheries openings and closings was appropriate and may have been the only practical way to get the information to all the fishers affected by the court's orders.

regard to tribal rights or the district court's orders. This action went beyond the Washington Supreme Court's holding that the Department was without authority to obey the district court's orders; instead, it required a direct violation of them. The normal requirements for injunctive relief were clearly present. Washington's reliance on 28 U.S.C. § 2283, which limits injunctions of state court proceedings, is misplaced. Section 2283 does not apply when the United States requests the injunction. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 224-26, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957). Nor should the district court have waited for the state system to resolve questions of state law; none were relevant. As a party to this action, the state was bound not to interfere with the district court's enforcement of its decree, and any state law to the contrary would fall under the Supremacy Clause. U.S.Const. art. VI, cl. 2.

VI COLUMBIA RIVER

A few issues concerning the Columbia River case deserve comment. The agreement reached by all the parties in early 1977 is a decree of the District Court of Oregon. No party has raised any questions in the district court concerning the State of Washington's authority to enter into the agreement and consent to the decree; the state is therefore bound by it. Under the principles discussed above, the fishers

from both sides of the river, Oregon and Washington, are bound by the decree binding the states, and the district court had authority to hold violators with actual knowledge in contempt.

The district court's jurisdiction extends to the entire Columbia River, not simply to the Oregon side. Oregon Admission Act of February 14, 1859, § 1, 11 Stat. 383; *The Annie M. Smull,* 1 Fed.Cas. 983 (No. 423) (D.Or.1872). *Nielsen v. Oregon,* 212 U.S. 315, 29 S.Ct. 383, 53 L.Ed. 528 (1909), simply holds that Oregon may not enforce its regulatory laws on the Washington side. It does not question the power of the district court to enforce federal law over the entire river.

VII CONCLUSION

We do not entertain the illusion that this is the last appeal we will see in this case. The issues involved are too volatile and raise too many emotions for a mere statement of the law to resolve them. On the other hand, neither this court nor the district court has any desire to be a permanent fish master in Washington waters. It is to be hoped that the parties can reach an agreement, as they did in the Oregon case, and that Washington law will be changed to allow the state to carry it out. Until the state decides to cooperate, the district court will have to continue protecting the tribes' rights. The state and the fishers hold the key to lifting federal judicial

interference with their fish-management prerogatives.

In Nos. 77-3208 and 77-3129, the applications for writs of mandamus are dismissed.

In Nos. 77-3209, 77-3654, and 77-3655, the judgments are affirmed.

The cases are remanded so that the district court may retain continuing jurisdiction.

KENNEDY, Circuit Judge, concurring:

The domensions of the state's resistance to the decrees in these cases are, in my view, over-stated by the opinion for the court, but I fully agree that by its policy with respect to this litigation the state has unduly complicated the issues without advancing its own cause. I agree further that an apportionment of fishing rights half to the treaty Indians and half to all other fishermen is binding on this panel. *United States v. Washington,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976). However, the court undertakes to restate the rationale for the apportionment rule of our earlier decision, and I find it necessary to suggest that the explanation of this critical point remains somewhat obscure.

The prior decision of this court and the opinion for the court on this appeal rely on an analogy to a cotenancy or to a "quasi-cotenancy" to rationalize the rule of even apportionment. The principles of a cotenancy apply to the legal relation among parties who share a right of possession in real or personal

property.[1] But the parties to this dispute claim rights of access and exploitation in a wildlife resource of fluctuating and uncertain extent. These rights do not depend upon possession, or even upon ownership, of the wildlife itself. The cotenancy analogy would be of dubious relevance even in an era when the supply of fish exceeded the demands of the fishing population.[2] Certainly it is inadequate to resolve the present conflict between treaty rights and asserted state authority to conserve and allocate a fishery that cannot sustain the full demands of all the parties to this litigation. A cotenant, absent acts of waste or ouster, has the right to possess and use the entire property.[3] Accordingly, serious application of the

[1]"For indeed tenancies in common differ in nothing from sole estates but merely in the blending and unity of possession." 2 W. Blackstone, Commentaries * 180.

[2]The term "tenants in common" was used in an early case to describe the rights of state citizens to the ownership of New Jersey oyster beds. *Corfield v. Coryell*, 6 Fed.Cas. 546, 552 (C.C.E.D.Pa.1823). The phrase, however, was used solely to explain the court's holding that state citizens collectively held one hundred percent of the rights to the shellfish to the exclusion of noncitizens, rather than as a point of departure for explaining a method of division.

[3]2 American Law of Property § 6.13, at 52-53 (A. J. Casner ed. 1952); R. Powell & P. Rohan, Powell on Real Property ¶ 603 (1 vol. ed. 1968); H. Tiffany, The Law of Real Property § 199 (3d ed. 1970).

At common law, property rules pertaining to ouster and waste insured that cotenants shared finite resources fairly, but to apply those rules to effect an allocation of the parties' rights here would stretch an already attenuated analogy to the breaking point. Moreover, there is substantial doubt that the apportionment theory of this case follows from those rules.

The standards which define waste for which a life tenant or tenant for years may recover are not necessarily applicable as between cotenants. The English rule is that, since a cotenant of a fee simple estate has the right to enjoy and use the common property in any reasonable way, the usual and ordinary use of the property by an owner in severalty is not waste. 2 American Law of Property, *supra* § 6.15, at 64; 2 W. Walsh, Commentaries on the Law of Real Property § 131, at 69 (1947). Thus, any cotenant may cut trees that are mature and fit for cutting, *Martyn v. Knowllys*, 101 Eng.Rep. 1313 (K.B.1799), and may develop and operate mining land, *Job v. Potton*, 20 Eq. 84 (1875), without liability for waste. In the United States, while it is clear

analogy might permit a fishing group to take all the fish it has the capacity to catch, a result contrary to the one we affirmed in the principal case.[4]

that acts which amount to destructive permanent damage to the common property are held to constitute waste, E. Hopkins, Handbook on the Law of Real Property § 214, at 342 (1896); 2 W. Walsh, *supra* § 131, at 72, some cases have followed the English rule allowing the cutting and sale of timber, *Hihn v. Peck*, 18 Cal. 641 (1861); *Buchanan v. Jencks*, 38 R.I. 443, 96 A. 307 (1916); *Williams v. Bruton*, 133 S.C. 395, 131 S.E. 18 (1925); *McDodrill v. Pardee & Curtin Lumber Co.*, 40 W.Va. 564, 21 S.E. 878 (1895), and the operation of mines, quarries, and oil wells, *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566 (8th Cir. 1924); *Cascaden v. Dunbar*, 191 F. 471 (9th Cir. 1911); *McCord v. Oakland Quicksilver Mining Co.*, 64 Cal. 134, 27 P. 863 (1883); *Payne v. Callahan*, 37 Cal.App.2d 503, 99 P.2d 1050 (1940), while others have held that the cutting and sale of timber, *Fitzhugh v. Norwood*, 153 Ark. 412, 241 S.W. 8 (1922); *Emmons v. Evans*, 178 Ky. 180, 198 S.W. 900 (1917), or the development or operation of mines or oil wells, *Clark v. Whitfield*, 218 Ala. 593, 119 So. 631 (1929); *Abbey v. Wheeler*, 170 N.Y. 122, 62 N.E. 1074 (1902); *McNeely v. South Penn Oil Co.* 58 W.Va. 438, 52 S.E. 480 (1905), constitues waste. In cases following the latter rule, courts have tended to call the action one for waste but to hold the defendant merely to a duty to account for the net proceeds from the operations rather than to impose the usual penalties, such as treble damages, for waste. *See generally* cases cited above and 2 American Law of Property, *supra* § 6.15; 2 W. Walsh, *supra* § 131.

Injunctive relief in an action for waste by one cotenant against another is granted only for waste which is "of a malicious character, or so unusual or unreasonable as to constitute a wanton destruction of the estate." *Mott v. Underwood*, 148 N.Y. 463, 42 N.E. 1048, 1050 (1896); *see McCord v. Oakland Quicksilver Mining Co.*, 64 Cal. 134, 27 P. 863 (1883); R. Powell & P. Rohan, *supra* ¶ 647, at 695.

With reference to ouster, a tenant who excludes his cotenants from the commonly held property by adverse possession is guilty of an ouster, and an action in ejectment may be brought by a dispossessed tenant. J. Cribbet, Principles of the Law of Property 104 (2d ed. 1975). "[T]he ousting tenant's possession must be exclusive, for mere possession and use of the entire property by one cotenant is not an ouster, nor is his possession adverse, so long as the other cotenants remain voluntarily out of possession, and are not kept out of possession by the acts of the possessor-tenant." 2 American Law of Property, *supra* § 6.13, at 52-54 (footnotes omitted).

'While courts will not interfere by way of injunction with cotenants' exercise of their rights to use and enjoyment of the cotenancy even when one cotenant has committed waste, *see* note 3 *supra*, an action for accounting for rents and profits between cotenants may be available when one cotenant has taken certain advantages from the property. Even when a cotenant's use does not constitute waste or ouster, he is required to account to his cotenants for their proportionate share of the net amount received from the cutting and selling of timber or the operation of mines or oil wells. *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566 (8th Cir. 1924) (oil); *Cascaden v. Dunbar*, 191 F. 471 (9th Cir. 1911) (gold mining); *Buchanan v. Jencks*, 38 R.I. 443, 96 A. 307 (1916) (timber); *see Martyn v. Knowllys*, 101 Eng.Rep. 1313 (K.B.1799). However, a

Most importantly, the concept of a cotenancy does not help the court determine what share of the disputed rights should be allocated to each of the parties. By relying so heavily upon the theory, the court seems to imply that an even apportionment follows from creation of a cotenancy; but, of course, it does not. Cotenancy is not synonymous with entitlement to equal shares.[5] Nor does the right of

cotenant is not required to account for crops grown and harvested by him. 2 American Law of Property, *supra* note 3, § 6.14, at 60; *see, e.g., Black v. Black*, 91 Cal.App.2d 328, 204 P.2d 950 (1949); *Le Barron v. Babcock*, 122 N.Y. 153, 25 N.E. 253 (1890). The distinction seems to be that a cotenant need not account for profits from a use of the cotenancy which does not reduce the permanent value of the property. *Cf.* 3 B. Witkin, Summary of California Law § 216, at 1948 (8th ed. 1973), suggesting that because of the possibility of exhausting the resources, the rule of accounting is a special rule applying only to oil and mineral rights. In *Mott v. Underwood*, 148 N.Y. 463, 42 N.E. 1048 (1896), the court assumed that a cotenant who planted oysters in a commonly held oyster bed could prevent his cotenants from interfering with the crop, though no cotenant could maintain an action for trespass or conversion against his cotenant for taking natural oysters from the land held in common. That case suggests that oysters, at least, might be treated in a manner similar to crops for purposes of an accounting. To the extent that a run of anadromous fish is capable of self-perpetuation, that is, up to the point where fishing activity reduces the quantity of fish in future runs, perhaps each cotenant should be allowed to take free from a duty to account.

Another factor in the equitable equation is that the State of Washington operates salmon hatcheries. In an action for an accounting, a cotenant who makes improvements on the property generally may not claim a credit for such expenditures. 2 American Law of Property, *supra* note 3, § 6.18, at 81. In an action for partition, however, a cotenant who has made an improvement is awarded any additional amount which the property might bring as a result of the improvement. *Id.* at 83; IV S. Symons, Pomeroy's Equity Jurisprudence § 1389, at 1018 (5th ed. 1941). Apparently neither the district court nor this court has considered whether the state's operation of hatcheries should have an effect on apportionment of the fish. *Cf. Department of Game v. Puyallup Tribe*, 414 U.S. 44, 94 S.Ct. 330, 38 L.Ed.2d 254 (1973) (*Puyallup II*) (reserving the question of whether the catch of steelhead that was developed from the state hatchery program could be taken into consideration in allocating the yearly catch between treaty Indians and sport fishermen).

Again, the cotenancy analogy, if taken seriously with reference to the rule of even apportionment, creates more problems than it solves.

[5]Each tenant in common may have a share greater or smaller than the shares of the others. 2 American Law of Property, *supra* note 3, § 6.5, at 19. If the shares are not fixed in the instrument creating the cotenancy it may be presumed that the cotenants take in equal shares, but an intent that they hold different fractional shares may be established by the circumstances. *Id.* at 19-20; E. Hopkins, *supra* note 3, § 209, at 336.

a cotenant to partition provide guidance for an equitable division of the fish. Effective use of that remedy presupposes a method of determining the percentage interests of the parties, but that is precisely the question to be answered in the case.

By using the cotenancy theory to explain the critical ruling on apportionment, the court tends to mask the most difficult problems of this litigation: definition of the rights recognized by the treaties, reconciliation of those rights with the state's legitimate interest in conservation,[6] and declaration of the parameters of the state's authority to protect its interest by appropriate regulation. These are the issues that must be resolved if the district court is ever to return the task of supervising the fishery to the state.

Indian treaties are not second-class agreements, and rights declared by them may not be whittled down year by year as the state asserts a need to exercise its regulatory authority. The state and, absent its cooperation, the federal courts, must protect the fishing resource in a manner that respects the rights of the treaty parties. The boundaries of the state's authority and any rule of apportionment must therefore be drawn with precise reference to the treaty understandings. The district court undertook to explain those understandings in its original decision, and proper review of its ruling requires a

[6]*See Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968) (*Puyallup I*).

like analysis. No doubt it would be correct to determine that the Indian tribes retained by treaty the right to fish for subsistence and ceremonial purposes and the right to a fair opportunity to compete in the recreational and commercial fisheries. But it has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation of those treaty rights.

I recognize that the opinion of the court does not advocate strict adherence to the technical rules of common law cotenancy as a means of resolving this case. The defects of the analogy, however, should be noted specifically, since alternative justifications for the apportionment rule have not yet been fully discussed. This panel is bound by *United States v. Washington, supra,* and thus I concur in today's judgment. However, I would not attempt to restate or explain that decision by means of an inappropriate analogy. We do not sustain the dignity of the treaties in question by deriving an apportionment rule from a hesitant reference to property concepts that are unrelated to the rights asserted by the parties.

WALLACE, Circuit Judge, concurring:

While I sympathetically agree with Judge Kennedy's statement that "it has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation of [the Indians'] treaty rights," I am compelled to join with Judge Goodwin based upon our prior decision in *United States v. Washington,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976).

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

MAKAH TRIBE, LOWER ELWHA BAND OF CLALLAM TRIBE, PORT GAMBLE BAND OF CLALLAM TRIBE, SUQUAMISH TRIBE, LUMMI TRIBE, NOOKSACK TRIBE and SWINOMISH INDIAN TRIBAL COMMUNITY,

Intervenors-Appellees,

v.

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES and DONALD W. MOOS, its Director,

Defendants-Appellants.

Nos. 75-2835 and 76-1042.

United States Court of Appeals, Ninth Circuit.

April 24, 1978.

Before CHAMBERS and KENNEDY, Circuit Judges, and JAMESON,* District Judge.

KENNEDY, Circuit Judge:

In the continuing litigation to implement and enforce the decrees we affirmed in *United States v. Washington* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d

*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

(1976), the district court issued certain injunctions against the State of Washington to enforce an allocation of fishing rights between treaty Indians and other fishermen during the 1975 salmon fishing season. The State of Washington challenges the injunctions on this appeal. We have determined the appeal should be dismissed as moot.

The first injunctive order in question directed the State of Washington and its Department of Fisheries to adopt certain regulations to implement and enforce directives of the 1975 International Pacific Salmon Fisheries Commission ("IPSFC" or "Commission") pertaining to sockeye and pink salmon fishing in United States waters.[1] Since the Commission promulgates fishing regulations on a yearly basis, the 1975 Commission directives are now fully superseded by other Commission orders. If there were a likelihood that the district court would require the state to implement Commission regulations for subsequent seasons, the legal questions presented here might be ones "capable of repetition, yet evading review," and thus amenable to adjudication notwithstanding their moot character in this case. *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498, 515,

[1]The IPSFC was created by the 1937 Convention between Canada and the United States to coordinate management of sockeye and pink salmon in the Fraser River system. 50 Stat. 1355 (1937). The Commission, composed of three American and three Canadian members, is authorized to issue regulations for supervising the fishery. These regulations, if approved by the respective countries, are ordinarily enforced in the United States through the cooperative efforts of federal and state agencies. 16 U.S.C. § 776d(a)-(b).

31 S.Ct. 279, 55 L.Ed. 310 (1911); *see Roe v. Wade,* 410 U.S. 113, 125, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). That, however, is not the position here.

After the 1975 season, it became unnecessary to utilize state regulations to accommodate the Commission directives and the court decree. The United States has taken steps to remove treaty Indians from the jurisdiction of the Commission and regulates treaty Indian fishing solely through the Bureau of Indian Affairs. The Commission regulations are enforced against nontreaty fishermen by the National Oceanic and Atmospheric Administration through its subagency the National Marine Fisheries Service and by the United States Coast Guard. The 1975 injunction which required the state to adopt regulations is not, therefore, likely to be reissued for later years.

Appellant argues that, even if repetition of this injunction is unlikely, two of the legal premises relied on by the district court are of continuing importance in this litigation and should be addressed here. These questions are whether or not the Washington Department of Fisheries is required to adopt and enforce fishing regulations in a manner designed to give treaty Indians the opportunity to catch fifty percent of the available fish, and whether this court's holding in *United States v. Washington, supra,* dictates that any fifty percent allocation must apply to waters under the jurisdiction of the IPSFC. Questions regarding the nature and extent of the

rights of treaty Indians to an allocation of the pink and sockeye salmon in IPSFC waters should not be discussed in a hypothetical context. Furthermore, the question of a percentage allocation is presented in *United States v. Washington,* 573 F.2d 1123 (9th Cir. 1978) (Nos. 77-3654 & 77-3655, filed April 24, 1978). These are not issues that threaten to elude review. Therefore we follow the rule that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971); *see DeFunis v. Odegaard,* 416 U.S. 312, 316, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1964).

The district court issued a second injunction directed to the Superior Court of the State of Washington in and for the County of Thurston. The federal injunction ordered a stay of state court orders requiring the Washington Department of Fisheries to suspend fishing regulations then in effect for the 1975 season. The 1975 season has now passed and neither the order of the United States district court nor that of the state court has current force. Moreover, the situation that gave rise to the federal injunction is unlikely to recur since, as noted above, state agencies are no longer relied upon to allocate fishing rights in the fisheries controlled by the IPSFC as between treaty Indians and others. The issues presented by the order enjoining the state proceedings are now moot.

Thirdly, the district court issued a preliminary injunction to prevent the state from enforcing state regulations which restricted certain types of net fishing by the Swinomish tribe. The purpose of the state regulation was to give effect to IPSFC directives. This injunction has no practical consequence for the parties now. It is not likely to be reissued. The responsibility for enforcement of IPSFC regulations has now been assumed solely by federal authorities, and we think the appeal from this order is also moot.

It must be quite apparent that the case tendered for our decision here would require us to address procedural questions that touch upon fundamental principles controlling the delicate balance of state and federal power. Beyond those questions we would further be required to interpret substantive rights of the parties under *United States v. Washington* that are of great significance to the fishing industry in the Northwest. We would not serve the vital interests of the parties by addressing such questions in a hypothetical case while other pending cases present the issues in an active context.

We dismiss this appeal as moot.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

vs.

STATE OF WASHINGTON, et al.,

Defendants.

XIVIL NO. 9213

MEMORANDUM ORDER AND PRELIMINARY INJUNCTION

The court has fully reviewed and carefully considered the motions of plaintiff, United States of America, and the plaintiff intervenor Tribes, the supporting and opposing memoranda, affidavits and attachments thereto, the documentary and testimonial evidence offered in open court at hearings held August 8 and August 25, 1977, as well as evidence offered at a hearing held on July 21, 1977 on aspects relevant to the present motions, and the oral argument of counsel. The Memorandum Order and Preliminary Injunction signed and entered by this court on August 10, 1977 and the clarifying minute order entered on August 12, 1977 are hereby vacated and superseded in their entirety by this Memorandum Order and Preliminary Injunction.

Based on all of the evidence, the prior holdings and decrees in this case, and certain decisions of the

Supreme Court of the State of Washington, this court FINDS, HOLDS and ORDERS as follows:

1. The defendant, State of Washington, and its courts, legislature and fisheries management and regulatory agencies and officers have failed and refused to manage and regulate the harvest of the fishery resources that are subject to the reserved treaty fishing rights of plaintiff tribes in a manner that will comport with the prior decrees of this court in this case declaring and enforcing those reserved fishing rights which were secured by the treaties of the United States referred to in Final Decision #1 in this case.

2. The defendant, State of Washington, through its attorneys herein, and the defendant Director of Fisheries, have stated that they are unwilling or unable to so manage and regulate such fishery resources and harvest and have stated that such inability is based, at least in part, on State law as recently pronounced by the Washington State Supreme Court and on the refusal of the State legislature to enact legislation authorizing the Department of Fisheries to regulate the harvest of the resource in conformity with the requirements of this court's prior decrees. (Tr. 8/8/77, pages 139-140, 160-162).

3. The inability or unwillingness to so manage and regulate such fishery resources and harvest imminently threatens to deprive the plaintiff tribes of their treaty rights as previously decreed by this

court unless this court provides for the allocation, under its direction and control, of the amount of fish from each run that must be reserved from State harvest control, and the amount that must be reserved for spawning escapement, in order to insure the plaintiff's tribes their right to take fish, both now and in the future, to the extent provided by this court's decrees.

4. The Supreme Court of the State of Washington held in the case of *Puget Sound Gillnetters Association, et al. v. Donald Moos, et al.*, No. 44401, decided June 9, 1977 (565 P.2d 1151), that the Department of Fisheries has a "statutory duty" under State law "to authorize the harvesting of salmon not required for * * * spawning" and that it "may restrict the harvesting of salmon by the commercial fishermen only to the extent that no surplus exists and that the restriction is necessary to prevent the impairment of the supply of salmon" and further that in carrying out this duty to authorize commercial harvest, the Director of Fisheries may not "allocate fish among competing claimants for purposes other than conservation," and specifically that he may not "allocate fish to treaty Indians or to non-Indians," and that "every fisherman in a class must be treated equally, and * * * given an equal opportunity to fish * * * ." In this regard the Supreme Court of the State of Washington held that treaty Indians are not a separate class, but that each Indian is a citizen of

the United States who may not be "granted special privileges and immunities. * * * Distinctions between fishermen based upon their race or ethnic background are not proper." It reaffirmed this holding on July 21, 1977 in *Purse Seine Vessel Owners Association v. Moos,* No. 43938.

5. The Director of the Department of Fisheries has stated publicly that as a State officer he feels bound to comply with the State Supreme Court holding in case No. 44401 even though the State court did not issue a writ of mandamus to order him to comply. (Tr. 8/8/77, page 137, 160-162). In declining to issue the writ the State court said, "We have full confidence that the Director will abide by our decision." (565 P.2d at 1152).

6. The holdings of the Washington Supreme Court are contrary to the affirmed decision and decree of this court on the federal questions of the nature and scope of the treaty fishing rights of Indian tribes and the obligations of the State toward those rights, which decision and decree are binding upon the defendants in this case, including the State of Washington and its Director of Fisheries. Specifically, this court has decreed that the treaty *tribes* hold the reserved treaty right to harvest anadromous fish. This reserved right is distinct from rights or privileges of others, does not depend upon State law, and may not be qualified by any action of the State. This court has also decreed that the tribes reserved the right to share equally with the non-treaty citizens

of the United States the opportunity to take fish at their usual and accustomed places and that the treaty fishermen as a group and non-treaty fishermen as a separate group are each to have the opportunity to take up to fifty percent (50%) of the harvestable number of fish that would reach such fishing places; that the Department of Fisheries' harvesting plan must provide for an opportunity for treaty Indians to take this share; and that State laws or regulations which affect the volume of anadromous fish available for harvest by a treaty tribe must be designed so as to carry out the purpose of the treaty provision. Neither the treaty Indians nor the non-treaty fishermen may fish in a manner so as to destroy the resource or to preempt it totally. This court has also decreed that the defendants must make "significant reductions in the non-Indian fishery, as are necessary to achieve the ultimate objective of the court's decision * * * ." (384 F.Supp. at 343, 345, 346, 401, 403, 406, 407, 408 and 420).

7. The defendant, Director of Fisheries, and defendant, Director of Game, have each on occasion applied RCW 75.12.060 and RCW 77.16.060 to restrict the exercise of the fishing rights of certain plaintiff tribes contrary to the holding and decree of this court. (Ex. PL 109, PL 110, PL 111; Tr. 8/8/77, (Sandison), pages 143-146).

8. On July 27, 1977, the Director of Fisheries, without prior notice to the plaintiffs or this court, adopted an emergency order closing certain areas,

including State Management Area 6A, to all treaty Indian salmon fishing except when opened by regulations of the International Pacific Salmon Fisheries Commission. (Ex. PL 103). The United States had previously taken official action to reject IPSFC control over the treaty Indian sockeye and pink salmon fisheries and to regulate such fisheries in IPSFC waters by regulations of the Department of the Interior. (42 Fed. Reg. 31450-31453; Tr. 8/8/77, 147-148).

9. On or about June 1, 1977, the Director of Fisheries adopted and filed with this court an emergency regulation closing Indian Treaty Puget Sound Salmon Management and Catch Reporting Areas 10B, 10C and 10D to commercial salmon fishing by treaty Indians for the reason that the existing forecast indicated that the 1977 Lake Washington sockeye run would be below spawning escapement needs and needed "complete protection." The Director adivsed the tribes and this court that if later data indicated a run in excess of escapement needs, the sport and net fishery could be authorized. (Ex. USA 141; USA 142).

10. On July 14, 1977 the Director of Fisheries adopted an emergency regulation opening areas 10C and 10D (Lake Washington) to sport fishing for sockeye commencing July 16, 1977 giving as his reason that the run size was then forecast to be 44,000 fish more than are needed for escapement and that an emergency opening was necessary to harvest

those excess fish. (Ex. USA 143). The Director refused tribal requests to rescind his conservation closure of the treaty Indian fishery on these same fish for the reason that RCW 75.12.010 prohibited a treaty net fishery in those areas. (Ex. USA 144; Tr. 8/8/77, page 151).

11. Although no conservation justification for a prohibition of the treaty fishery in Lake Washington or in management area 10B existed subsequent to July 14, 1977 the Director did not rescind the closure of the treaty fishery until July 21, 1977 after the plaintiffs had obtained that date for hearing in this court on a motion for injunctive relief against the continuance of the closure. (Ex. F 111). By that time, the Department of Fisheries had established that the harvestable surplus in the run was 61,000. (Tr. 7/21/77, page 151).

12. Under the protection of a Temporary Restraining Order of this court, the Muckleshoot and Suquamish Tribes authorized tribal fisheries to take up to 30,500 fish. The State and the tribes monitored this fishery. This fishery was closed by the Muckleshoot and Suquamish Tribes after tribal members had taken their allotted number of fish.

13. On July 22, 1977 the Director of Fisheries adopted regulations for the 1977 commercial harvest of Puget Sound chinook, coho and chum salmon runs. (Ex. PL 102). Neither the regulations nor the accompanying statement of "1977 Regulatory Considerations" makes any reference to treaty rights

of any Indians, nor do they contemplate compliance by the State through its Department of Fisheries with decrees and orders of this court in this case. The regulations are intended to apply to treaty Indians and non-treaty fishermen alike. (Ex. PL 121; Tr. 8/8/77 (Sandison), pages 139, 171-172). The regulations fail to provide the plaintiff tribes with the opportunity to harvest their share of such salmon as decreed by this court and are in violation of the decreees and orders of this court.

14. RCW 75.12.010 is broader than necessary for the preservation of the fishery resource and does not meet the standards previously declared by this court for State measures which may lawfully be applied to restrict members of treaty tribes from exercising their tribe's treaty fishing rights or which may be applied to authorize non-treaty fishing within limitations prescribed by the decrees of this court.

15. The Fisheries Advisory Board appointed a Technical Committee consisting of five biologists representing treaty tribes and four biologists from the Department of Fisheries to develop a joint report on the run sizes, escapement goals, harvest numbers, troll and sport interception rates and ceremonial and subsistence numbers for 1977 runs of chum and coho salmon returning to the various Puget Sound salmon management areas. That committee's unanimous report was approved by the Fisheries Advisory Board on August 24, 1977 and filed with the court on

August 25, 1977. On the basis of that report the court finds that harvest allocations for such runs shall be based upon the following data, subject to in-season updates of pre-season estimates of run sizes and harvest numbers to be determined as provided in this Order:

COHO

Management Regions	Run Size	Escapement Goal	Total Harvestable Number	*Prior Interceptions
Straits	59,000	11,000	48,000	12,000
Nooksack-Samish	122,000	4,000	118,000	24,000
Skagit	66,000	35,000	31,000	13,000
Snohomish-Stillaguamish	198,000	66,000	132,000	39,000
South Sound	513,000	45,000	468,000	100,000
Hood Canal	98,000	22,000	76,000	19,000

*Excludes 5,000 coho interceptions by treaty Indians

CHUM

Straits	No harvestable runs expected			
Nooksack-Samish	12,300	6,000	6,300	0
Skagit	42,500	56,200	0	0
Snohomish-Stillaguamish	18,000	22,600	0	0
South Sound	250,500	113,000	137,500	0
Hood Canal	204,000	142,000	62,000	0

16. The following figures represent subsistence and ceremonial and on-reservation estimates of treaty catch as previously filed by plaintiff tribes with this Court:

Subsistence and Ceremonial

(The below listed number should be added to the run size and harvestable numbers above listed)

	COHO	CHUM
Straits	2,000	300
Nooksack-Samish	4,000	5,000
Skagit	1,600	1,200
Snohomish-Stillaguamish	2,200	5,500
South Sound	17,000	11,300
Hood Canal	3,600	3,500

On-Reservation

	COHO	CHUM
Straits	12,000	—
Nooksack-Samish	No estimates available	
Skagit	3,400	—
Snohomish-Stillaguamish	7,800	—
South Sound	28,000	14,000
Hood Canal	12,000	14,000

The percentage allocations ordered herein for coho and chum salmon are solely limited to the 1977 Puget Sound salmon runs and are based on the facts, circumstances and equities peculiar to this year's salmon runs. These allocations of coho and chum salmon shall not be interpreted in any way as an express or implied modification by this court of Final Decision #1.

17. **Coho Salmon Allocation**

For 1977 the allocations of Puget Sound area coho salmon to the treaty Indian fisheries, including fish taken for subsistence and ceremonial purposes and those taken on the reservations, shall be 45% of the total harvestable numbers shown in paragraph

15 above and the allocations to the non-treaty commercial fisheries shall be 55% of such harvestable numbers.

Because North Sound treaty tribes have benefitted from fishing on unusually abundant sockeye and pink salmon runs, while the South Sound tribes have not, the court orders, in the interest of equity, that the 45% allocation to the treaty fishery be divided so that the share in South Sound is closer to 50%, while that in North Sound is somewhat further from 50%, as shown below:

Approximate Percentage of Total Harvestable Coho

Area	Non-Treaty Fishermen	Treaty Fishermen
Strait of Juan de Fuca	55	45
Bellingham Bay-Samish Bay (Nooksack-Samish Rivers)	60	40
Skagit River	63	37
Snohomish-Stillaguamish R.	58	42
South Sound	52	48
Hood Canal	55	45

Purposes of the above division of catch are to give a 55%-45% overall allocation, and to give a sharing formula of the salmon runs inside Puget Sound which will approximate 60% to the treaty fishery and 40% to the non-treaty fishery in all regions except Bellingham Bay, which is approximately 50% to the treaty fishery and 50% to the non-treaty fishery. The allocation percentages inside Puget Sound are intended to provide an allocation that can be attainable in practice without complex

manipulations in management of the treaty and non-treaty fisheries.

These percentages shall continue to apply to any revision in those harvestable numbers that may be found to be required because of revised estimates of run sizes.

(a) **Strait of Juan de Fuca Tributaries**

Based upon the agreed total numbers of coho shown in the table, the court is satisfied that the allocation ordered by the court can be achieved by an allocation of 60% of the allowable catch in Puget Sound of the salmon originating in the Strait of Juan de Fuca tributaries to treaty Indian fishermen and 40% to non-treaty fishermen. On the basis of the run size estimates now available, the allocation would be 22,500 coho to treaty Indian fishermen and 15,500 to non-treaty fishermen. The non-treaty fishermen will have taken an estimated 12,000 coho in the troll and sport fishery prior to their return. This number, when added to the 15,500 coho allocated to non-treaty fishermen, will approximate 55% of the harvestable number of coho.

(b) **Bellingham Bay-Samish Bay (Nooksack-Samish Rivers)**

Based upon the agreed total numbers of coho shown in the table, the court is satisfied that the allocation ordered by the court can be achieved by an allocation of 50% of the allowable catch of the Bellingham Bay-Samish Bay (Nooksack-Samish

Rivers) salmon in Puget Sound to treaty Indian fishermen and 50% to non-treaty fishermen. On the basis of the run size estimates now available, the allocation would be 49,000 coho to treaty Indian fishermen and 49,000 to non-treaty fishermen. The non-treaty fishermen will have taken an estimated 24,000 coho in the troll and sport fishery prior to their return. This number, when added to the 49,000 coho allocated to non-treaty fishermen, will approximate 60% of the total harvestable number of coho.

(c) **Skagit River**

Based upon the agreed total numbers of coho shown in the table, the court is satisfied that the allocation ordered by the court can be achieved by an allocation of 60% of the allowable catch of the Skagit River salmon in Puget Sound to treaty Indian fishermen and 40% to non-treaty fishermen. On the basis of the run size estimates now available, the allocation would be 12,000 coho to treaty Indian fishermen and 7,600 to non-treaty fishermen. The non-treaty fishermen will have taken an estimated 13,000 coho in the troll and sport fishery prior to their return. This number, when added to the 7,600 coho allocated to non-treaty fishermen, will approximate 63% of the total harvestable number of coho.

(d) **Snohomish-Stillaguamish Rivers**

Based upon the agreed total numbers of coho shown in the table, the court is satisfied that the

allocation ordered by the court can be achieved by an allocation of 60% of the allowable catch of the Snohomish-Stillaguamish salmon in Puget Sound to treaty Indian fishermen and 40% to non-treaty fishermen. On the basis of the run size estimates now available, the allocation would be 57,000 coho to treaty Indian fishermen and 38,500 to non-treaty fishermen. The non-treaty fishermen will have taken an estimated 39,000 coho in the troll and sport fishery prior to their return. This number, when added to the 38,500 coho allocated to non-treaty fishermen, will approximate 58% of the total harvestable number of coho.

(e) **South Sound**

Based upon the agreed total numbers of coho shown in the table, the court is satisfied that the allocation ordered by the court can be achieved by an allocation of 60% of the allowable catch of South Sound salmon in Puget Sound to treaty Indian fishermen and 40% to non-treaty fishermen. On the basis of the run size estimates now available, the allocation would be 231,000 coho to treaty Indian fishermen and 154,000 to non-treaty fishermen. The non-treaty fishermen will have taken an estimated 100,000 coho in the troll and sport fishery prior to their return. This number, when added to the 154,000 coho allocated to non-treaty fishermen, will approximate 52% of the total harvestable number of coho.

(f) **Hood Canal**

Based upon the agreed total numbers of coho shown in the table, the court is satisfied that the allocation ordered by the court can be achieved by an allocation of 60% of the allowable catch of Hood Canal salmon in Puget Sound to treaty Indian fishermen and 40% to non-treaty fishermen. On the basis of the run size estimates now available, the allocation would be 36,400 coho to treaty Indian fishermen and 24,200 to non-treaty fishermen. The non-treaty fishermen will have taken an estimated 19,000 coho in the troll and sport fishery prior to their return. This number, when added to the 24,200 coho allocated to non-treaty fishermen, will approximate 55% of the total harvestable number of coho.

18. **Chum Salmon Allocation**

For 1977 the allocations of Puget Sound area chum salmon to the treaty Indian fisheries, including fish taken for subsistence and ceremonial purposes and those taken on the reservations, shall be 50% of the harvestable numbers shown in paragraph 15 above and the allocations to the non-treaty commercial fisheries shall be 50% of such harvestable numbers. These percentages shall continue to apply to any revision in those harvestable numbers that may be found to be required because of revised estimates of run sizes.

Because there are no significant prior interceptions of chum salmon, the allocation of chum salmon

is a one-step process. Accordingly, for chum salmon originating in the Bellingham Bay-Samish Bay (Nooksack-Samish Rivers) the allocation is 5,650 chum salmon to the treaty fishery and 5,650 chum salmon to non-treaty fisheries.

For the chum salmon originating in South Sound the allocation is 74,400 chum salmon to the treaty fishery and 74,400 chum salmon to non-treaty fisheries.

For the chum salmon originating in Hood Canal the allocation is 32,750 chum salmon to the treaty fishery and 32,750 chum salmon to the non-treaty fisheries.

19. **Chinook Salmon Allocation**

Chinook salmon are hereby allocated to treaty Indian and non-treaty fishermen on the basis of a percentage of the Washington Department of Fisheries' present run size predictions.

(a) Bellingham Bay Chinook Salmon:

The Court is satisfied, based on the advice of its technical advisor, Dr. Richard Whitney, that the proper allocation to treaty Indian fishermen will be achieved by an allocation of 60% (which includes on-reservation, ceremonial and subsistence catches) of the allowable catch in Puget Sound to treaty Indians and 40% to non-treaty fishermen.

On the basis of the present Washington Department of Fisheries run size predictions, there would be 47,200 salmon for treaty Indians and 31,500 salmon for non-treaty fishermen. Preliminary

estimates disclose that the non-treaty troll and sport fishery will take an estimated 10,600 chinook salmon prior to their return to Bellingham Bay. This number, when added to the 31,500 chinook salmon allocated to non-treaty fishermen, will approximate 50% of the harvestable number of chinook salmon after deducting the on-reservation, ceremonial and subsistence catches.

The report of the Fisheries Advisory Board of August 23, 1977 on the subject of the Bellingham Bay chinook fishery informed the court that the non-treaty share of chinook salmon in Bellingham Bay had been reached and therefore the non-treaty fishery was scheduled to close August 24, 1977.

(b) Skagit Bay Chinook Salmon:

The Court is satisfied, based on the advice of its technical advisor, Dr. Richard Whitney, that the proper allocation to treaty Indian fishermen will be achieved by an allocation of 70% (which includes on-reservation, ceremonial and subsistence catches) of the allowable catch in Puget Sound to treaty Indians and 30% to non-treaty fishermen.

On the basis of the present Washington Department of Fisheries run size predictions, there would be 6,600 salmon for treaty Indians and 2,800 salmon for non-treaty fishermen. Preliminary estimates disclose that the non-treaty troll and sport fishery will take an estimated 1,800 chinook salmon prior to their return to Skagit Bay. This number when added to the 2,800 chinook salmon allocated

to non-treaty fishermen will approximate 50% of the harvestable number of chinook salmon after deducting the on-reservation, ceremonial and subsistence catches.

The report of the Fisheries Advisory Board of August 23, 1977 on the subject of the steps taken by the Washington Department of Fisheries to comply with the Memorandum Order and Preliminary Injunction signed by this court on August 10, 1977 informed the court that Skagit Bay was closed to non-treaty fishermen August 18, 1977 because the non-treaty allocation was reached.

(c) Hood Canal Chinook Salmon:

The Court is satisfied, based on the advice of its technical advisor, Dr. Richard Whitney, that the proper allocation to treaty Indian fishermen will be achieved by an allocation of 75% (which includes on-reservation, ceremonial and subsistence catches) of the allowable catch in Puget Sound to treaty Indians and 25% to non-treaty fishermen.

On the basis of the present Washington Department of Fisheries run size predictions, there would be 12,500 salmon for treaty Indians and 4,100 salmon for non-treaty fishermen. Preliminary estimates disclose that the non-treaty troll and sport fishery will take an estimated 4,700 chinook salmon prior to their return to Hood Canal. This number when added to the 4,100 chinook salmon allocation to non-treaty fishermen will approximate 50% of the harvestable number of chinook salmon after

deducting the on-reservation, ceremonial and subsistence catches.

The court is informed by the court's technical advisor, Dr. Richard Whitney, that the treaty allocation of chinook salmon in Hood Canal has been reached and the treaty fishery has therefore been closed.

(d) Closures.

Non-treaty fishermen shall not fish commercially for chinook salmon in any Puget Sound area (including Strait of Juan de Fuca), other than Hood Canal, as above specified, unless prior approval of the regulations authorizing such fishing is obtained from the court's Fisheries Advisory Board or the court.

Treaty fishermen shall not fish in Hood Canal, as above specified, unless prior approval of the regulations authorizing such fishing is obtained from the court's Fisheries Advisory Board or the court.

20. Gordon Sandison is the duly appointed Director of Fisheries of the State of Washington. Ralph W. Larson is the duly appointed Director of Game of the State of Washington.

21. The issuance of a preliminary injunction is necessary to prevent irreparable injury to the plaintiff tribes and their members.

22. The United States of America and the plaintiff tribes have no adequate remedy at law.

23. It is necessary in aid of this court's jurisdiction and to protect and effectuate its

judgments that a Preliminary Injunction be issued as hereinafter set out.

REMOVAL OF TREATY ALLOCATION FROM STATE EXERCISE OF JURISDICTION

The Supreme Court of the United States has held that while the states have jurisdiction under their police power to regulate the off-reservation exercise of the treaty Indians' reserved fishing right to the extent necessary to preserve the resource, they do not have the authority to qualify that right, even though the Indians are now citizens of the United States. *Puyallup Tribe v. Department of Game,* 391 U.S. 392, 398 (1968). That Court has not hesitated to prohibit the application to treaty Indians of state laws that went beyond this limited power of regulation. *Antoine v. Washington,* 420 U.S. 194 (1975); *Washington Department of Game v. Puyallup Tribe,* 414 U.S. 44 (1973); *Tulee v. Washington,* 315 U.S. 681 (1942). The Court of Appeals for this Circuit has done likewise. *United States v. Washington,* 520 F.2d 676 (1975) (this case); *Holcomb v. Confederated Tribes,* 382 F.2d 1013 (1967); *Maison v. Confederated Tribes,* 314 F.2d 169 (1963); *Makah v. Schoettler,* 192 F.2d 224 (1951).

On the basis of the above findings of State refusal to manage the fishery resources that are subject to the reserved and federally-secured rights

of the plaintiff tribes and to regulate the harvest thereof in a manner that conforms to this Court's prior holdings and decrees that have now become final and binding as a result of completion of appellate review, this Court reluctantly, but necessarily, finds that it is necessary for this Court to make the allocations required to effectuate those decrees, including approval of allocations of fish necessary for propagation escapement to perpetuate the fish runs, and to enjoin the State from exercising any form of jurisdiction over the fish so allocated without obtaining the express approval of this Court in a manner herein provided for.

It is further necessary that this court require the defendants to adopt and enforce appropriate regulations to prevent non-treaty fishermen from taking more than their allocated shares of the runs or from taking fish needed for propagation to perpetuate the runs.

Accordingly, it is HEREBY ORDERED that:

A. The 1977 allocations of Puget Sound salmon shall be those adopted in this Memorandum Order and Preliminary Injunction unless modified by this court.

B. The Washington Department of Fisheries shall be responsible for developing updated estimates of run sizes for coho and chinook salmon as each particular fishery develops and advise the court, the court's Technical Advisor, and the Northwest Indian Fisheries Commission who shall in turn be

responsible for notifying each affected treaty Indian tribe thereof.

As to chum salmon the court hereby refers the matter to the Fisheries Advisory Board for the development of an appropriate method of updating in-season run size estimates.

C. Any challenges of the Washington Department of Fisheries shall be presented to the Fisheries Advisory Board pursuant to the established procedures.

D. Jurisdiction and harvest control over all allocations for treaty fisheries is hereby vested in this court. The defendants, State of Washington, Director of Fisheries, and State Game Commission and Director, and their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them who have actual notice of this or subsequent orders are hereby enjoined from exercising jurisdiction or any form of harvest management, authorization or control over, or in any manner regulating, restricting, prohibiting or interfering with the taking, fishing for, possessing or disposing of, the fish comprising that portion of any run allocated by this court to the treaty fisheries, except as specifically provided for in this or subsequent order of this court.

E. The defendants, State of Washington, Director of Fisheries, State Game Commission and Director, and their officers, agents, servants, employees, attorneys, and all other persons in active

concert or participation with them who have actual notice of this or subsequent orders are hereby further enjoined to manage and regulate the harvest of the portions of such runs not herein removed from the defendants' jurisdiction and control in such manner as will assure the escapement from non-treaty harvest of the numbers of fish allocated to propagation escapement and to the treaty fisheries pursuant to this order. Copies of all State regulations governing the non-treaty harvest in the case area shall be filed with the court's Fisheries Technical Advisor, each affected plaintiff tribe, the United States Fish and Wildlife Service, the Northwest Indian Fisheries Commission, and their respective counsel. The State shall carefully monitor any non-treaty fishery and immediately advise the court when any non-treaty catch meets the quota specified in this court's allocation and also advise this court of any encroachment on spawning escapement goals and of the extent and effectiveness of State efforts to prevent such encroachment.

REGULATION OF TREATY ALLOCATION

F. Regulation and harvest control over the fish allocated to treaty fishermen pursuant to this Order shall remain with the court. Tribal regulations governing such fishery shall be adopted and filed with the court in strict conformance with Final Decision No. 1 and subsequent orders of this court.

G. Nothing in this Order shall diminish the immunity from state regulation or affect the jurisdiction of self-regulatory tribes as prescribed by prior Orders of this court, except that such tribes shall be bound by the allocations made effective pursuant to the provisions of this Order.

H. The United States, through its appropriate agencies and officers, is hereby directed to monitor fishing activities in the waters of the case area for and on behalf of the court and to report to the court on a daily basis, with copies to all affected parties, regarding the extent of compliance with State, tribal and court determined regulations and to immediately report any substantial violations thereof to the court for further action as the court deems appropriate.

MISCELLANEOUS PROVISIONS

I. The defendants shall not apply or enforce RCW 75.12.010 or the regulations of the Director of Fisheries concerning certain Puget Sound salmon fisheries adopted July 22, 1977, to regulate, limit or restrict the exercise of the fishing rights of a treaty tribe or to authorize a non-treaty harvest in excess of the amounts allocated for that purpose pursuant to this Order.

J. The defendants shall not adopt, apply or enforce any regulations — including Director of Fisheries Order No. 77-60 — to regulate, limit or restrict any fishing by members of a treaty tribe that is authorized by regulations of the United States or

any of its agencies without first obtaining the prior express approval of this court.

K. The defendants shall not apply or enforce any emergency regulations adopted under the permission of paragraph 19 of this court's Injunction of March 22, 1974, as modified by the Order of December 27, 1976, Order Re: Rules of Procedures for Fisheries Advisory Board, to limit or restrict the exercise of the fishing rights of a treaty tribe beyond the period for which the facts and circumstances of the emergency recited in the statement filed with this court continue to exist or beyond thirty days after the adoption of such emergency regulations, whichever is shorter, *provided* that for regulations heretofore adopted, said thirty-day period shall commence on the date of this Order. The foregoing durational limitation on emergency orders shall not preclude the defendants from adopting, in accordance with the approved procedural and other provisions of this court's orders, continuing regulations or renewing emergency regulations to deal with conditions that extend beyond thirty days. The defendants shall not, without the prior approval of this court, adopt, apply or enforce any emergency closure or limitation of treaty fishing if the non-treaty fishermen have taken more than the number of fish allocated pursuant to this order for the non-treaty harvest from any run affected by such regulation.

L. The portions of this court's order of March

22, 1974 entitled "Interim Plan and Stay Order Pending Final Decision on Appeal" which stay certain portions of Final Decision No. 1, the Decree of February 12, 1974 and of the Injunction of March 22, 1974 are hereby terminated.

M. Gordon Sandison is hereby substituted for Donald W. Moos and Ralph W. Larson is substituted for Carl Crouse as Intervenors-Defendants herein, but this does not relieve Donald W. Moos as a defendant with respect to the separate Motions of Certain Tribes and of the United States for Sanctions for Failure to Make Discovery dated November 30, 1976, and December 2, 1976, respectively.

IT IS SO ORDERED, ADJUDGED AND DECREED this 31st day of August, 1977.

/s/_____
George H. Boldt
Sr. United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES, et al.,
Plaintiffs,

vs.

STATE OF WASHINGTON, et al.,
Defendants.

CIVIL NO. 9213

MEMORANDUM ADOPTING SALMON MANAGEMENT PLAN

APPENDIX A

The court has carefully reviewed and fully considered the report of the court's Fisheries Advisory Board, dated July 14, 1977, concerning an agreed upon salmon management plan for 1977, subsequent modifications thereto as proposed by the parties and the court's technical advisor, Dr. Richard R. Whitney, the oral argument of counsel presented in open court at a hearing held August 30, 1977, and the oral recommendation of the court's technical advisor, Dr. Whitney.

Upon careful consideration and review it appears that the parties, with only a few exceptions, are in basic agreement. It is also clear that all parties, the court's technical advisor, and the court agree that a salmon management plan for 1977 is essential. Moreover, in the opinion of the court it is imperative

that a salmon management plan be adopted by this court forthwith.

Accordingly, the court adopts the following plan, effective immediately, which in the opinion of the court will best accommodate the interests of all parties. However, the court recognizes that this plan is not an end, in and of itself. Therefore, the court instructs the parties to continue to work together with the court's technical advisor, and through the Fisheries Advisory Board, to refine issues that may still require clarification, modification, or development, such as the three points raised by Dr. Whitney in his memorandum to the court dated August 30, 1977, and to present to the court for approval any proposed clarifications to which all parties agree.

The following plan shall continue in effect until May 30, 1982. However, on or before May 1 of each succeeding year, beginning with 1978, the parties are instructed to confer with each other and the court's technical advisor with respect to any recommended clarifications and/or modifications of any provisions contained in the salmon management plan then in effect. If no modifications are proposed to the court prior to May 15 of any year, the then existing salmon management plan will automatically continue in effect for another year.

1. **Preamble**

1.1 The purpose of this plan is to establish guidelines for management of salmonid resources originating in or passing through Washington waters

from the mouth of the Strait of Juan de Fuca eastward (Puget Sound). The parties, hereto, all Puget Sound Treaty Tribes, and the State of Washington, agree to a philosophy of cooperation in implementing management programs to maintain, perpetuate and enhance the salmonid resources.

1.2 This plan is intended to insure that treaty fishermen and non-treaty fishermen subject to their respective regulatory authorities shall be accorded the opportunity to harvest their shares as determined in *United States v. Washington,* 384 F. Supp. 312, *aff'd* 520 F.2d 676, *cert. denied* 423 U.S. 1086 (1976).

1.3 The parties agree to enact and recommend for enactment by the Pacific Fishery Management Council, appropriate regulations for the ocean salmon fishery that will provide for adequate escapement of salmon into Puget Sound waters to achieve the goals and purposes of this plan.

1.4 The parties shall advocate and recommend to the appropriate governmental and regulatory entities, international agreements to reduce foreign interceptions, particularly Canadian, of salmonids originating from Puget Sound.

1.5 The duration of this plan shall be for five (5) years from the date of acceptance by the court, subject to annual review, renewal, and modification, except that the provision (Sec *7.2*) for the annual adjustment of shares shall be modified only upon terms that are equitable.

1.6 Where action of the parties is required in this plan, failure to act or to reach agreement shall be resolved as provided in section 11.

1.7 This order supplements and where inconsistent modifies the order on certain questions re: Fisheries Management, dated April 13, 1976, *United States v. Washington,* Civil No. 9213 WD Wash, which is hereby extended and shall remain in effect until further order of the court. This order also supplements and, where inconsistent, modifies the Order for Program to Implement Interim Plan, dated October 8, 1974 as extended by the Minute Order dated April 5, 1976 and the Order Re: Rules of Procedure for Fisheries Advisory Board and Resolution of Disputes, dated December 17, 1976.

This order, for example, removes from the court much of the burden of making equitable adjustments through an automatic adjustment mechanism (Section 7.2).

2. **Definitions** — Except where the context clearly requires otherwise, the following terms used in this plan have the following meanings:

2.1 **Prior net interceptions.** Harvest by net fisheries of a run outside of its region of origin. Computed separately for treaty and non-treaty fishermen.

2.2 **Region of origin.** A geographic area which can be used to separate runs of the same species. The following geographic areas are recognized regions of origin for Puget Sound: 1) Strait of Juan de Fuca

(Tributaries) 2) Bellingham-Samish Bays-Nooksack-Samish Rivers 3) Skagit 4) Stillaguamish-Snohomish 5) South Puget Sound, South of Snohomish System 6) Hood Canal 7) Canada.

2.3 **Run.** A stock, or group of stocks identified for fishery management purposes which return to the same region of origin at similar times.

2.4 **Run management period.** A time interval during which a specific run is a target of a fishery in a particular harvest management area.

2.5 **Run size.** The total number of fish in a run.

2.6 **Salmonid.** Refers only to the following species:

Chinook—*Oncorhynchus tshawytscha* (also called spring, king, tyee, or blackmouth)

Coho—*Oncorhynchus kisutch* (also called silver, silverside, or hooknose)

Pink—*Oncorhynchus gorbuscha* (also called humpback or humpy)

Chum—*Oncorhynchus keta* (also called dog or keta)

Sockeye—*Oncorhynchus nerka* (also called red or blueback)

Steelhead—*Salmo gairdneri*

2.7 **Stock.** A population of one species migrating to a particular lake or stream (or portion thereof) within a region of origin, at a particular season.

2.8 **Twelve Questions.** Order on Certain Questions re: Fisheries Management, dated April 13, 1976, *United States v. Washington,* W.D. Wash. No. 9213.

2.9 **Viable natural stock.** A stock for which a spawning escapement goal is established with the intent that the fishery will be managed to meet this goal.

3. **Steelhead stocks.** The parties shall manage from the premise that steelhead and salmon fisheries are intimately related.

The parties have made substantial progress in developing cooperative plans for scientific management of steelhead in their respective river systems, and it is important that these efforts result in firm management agreements prior to the 1977-78 steelhead season.

Therefore, prior to October 1, 1977, the affected parties shall reach agreement regarding the management of steelhead fisheries system by system and stock by stock

4. **Escapement.** Meetings of technical representatives regarding escapement goals during development of joint management principles for 1977 have proven especially productive. Therefore, the concepts of the "Initial Understandings on Technical Issues", of April 12, 1977, are essentially incorporated herein. This section, also, addresses the special problems which have arisen in past seasons from unilateral changes in escapement goals for hatchery stock requirements. Sections 4.2.1.1 and 4.3.1 will resolve such questions prior to the season in the future. Basic premises used are that harvest and enhancement policies and programs must be

tempered with the understanding that certain natural stocks of salmonids native to particular river systems should be preserved and protected sufficiently to insure their perpetual existence and production.

4.1 Escapement goals shall be developed separately for natural stocks and hatchery stock requirements.

4.2 Escapement goals for natural stock requirements apply to those stocks where egg deposition and fertilization occur naturally.

4.2.1 Escapement goals for natural stock requirements shall be established only for viable natural stocks.

4.2.1.1 The affected parties shall reach agreement as to which natural stocks shall be considered viable natural stocks.

The following natural runs have been determined by WDF not to be viable for harvest management purposes and in terms of achieving full natural spawning escapement goals WDF has conducted artificial production programs accordingly:

Bellingham Bay	1977, 78, 79, 80	Chinook
	1977, 78	Coho
Skokomish River	1977, 78, 79, 80	Chinook
	1978	Coho
Carr Inlet	1977, 78	Coho
Puyallup River	1977, 78	Coho
Duwamish-Green River	1977, 78	Coho

Dungeness River	1977, 78	Coho
Elwha River	1977, 78	Coho

From the date of the adoption of this plan, parties shall agree on the enhancement planning that determines which natural stocks are considered viable and, therefore, determines future harvest management policies. This must, however, be in the manner and time frame described below:

a) for new facilities this shall first be considered during the site selection and facility planning stages.
b) for all facilities this shall be considered prior to annual hatchery programming, on or about August 1 of each year.

In reaching an agreement, the parties shall consider the following factors:

Impact upon existing hatchery stock harvest in the mixed stock fishery and the terminal fishery due to harvest rates necessary to provide for the natural escapement goal.

Harvestable numbers presently produced by a natural stock, or which may be projected based upon potentially available spawning ground and/or rearing environment.

Unique characteristics of the natural stock with respect to behavior, physiology or morphology, which indicate value for future natural or hatchery stock development.

4.2.2 Except as otherwise agreed between all affected parties, a viable natural stock as determined

in section 4.2.1.1 shall remain a viable natural stock from year to year.

4.2.3 Annually, prior to each fishing season, the affected parties shall reach agreement as to escapement goals for natural stocks, according to the following schedule:

fall chinook stocks — April 1
coho stocks — May 1
chum stocks — June 1
all other stocks — at least forty (40) days prior to the entry of the stock into Puget Sound.

4.2.4 Escapement goals for natural stocks shall be the number of spawners which would, in an average year, maximize the biomass of juvenile outmigrants subsequent to incubation and freshwater rearing, under average environmental conditions. These goals shall be consistent with the population limiting factors for each species, e.g., spawning area and/or rearing area. In cases where the total run size of a stock entering Puget Sound is less than the escapement goal, it is understood that the escapement goal will not be fully attainable.

4.2.5 Except as otherwise agreed by all affected parties, escapement goals under this section 4.2 shall not be changed during the fishing season.

4.3 Escapement goals for hatchery stock requirements apply to those stocks from which eggs are collected and fertilized artificially.

4.3.1 The escapement goal for hatchery requirements is that number of spawners needed from a stock to meet an artificial production

plan that is agreed upon by all affected parties.

4.4 Prior to the fishing season the affected parties shall reach agreement as to the methods for estimating actual escapement to the spawning grounds according to the following schedule:

fall chinook stocks — April 1
coho stocks — May 1
chum stocks — June 1
all other stocks — at least forty (40) days prior to the entry of the stock into Puget Sound.

4.5 Annually, prior to the fishing season, the Washington Department of Fisheries shall provide to all parties proposed draft reports on the following schedule:

fall chinook stocks — March 1
coho stocks — April 1
chum stocks — May 1
all other stocks — at least seventy (70) days prior to the entry of the stock into Puget Sound.

These reports shall be prepared on a system by system, species by species basis and shall contain proposed escapement goals for natural stock and hatchery stock requirements, and proposed methods and data for estimating escapement. These reports shall serve as a basis for discussions and to promote mutual understanding between the parties in reaching agreements as to these matters.

5. **Run Size Estimation.** The "Initial Understandings on Technical Issues," of April 12, 1977, demonstrate the clear agreement of all parties that some pre-season forecasts are inadequate and that in-season run strength estimation, together with

pre-season forecasts, must be utilized for harvest management, both for providing escapement and allocation of the harvest.

5.1 Qualitative and quantitative pre-season forecasts shall be distributed by the Washington Department of Fisheries to all parties for each salmon species and region of origin. These reports shall include detailed data on brood year spawning escapements and artificial production releases, and other data and methods used to derive the pre-season forecasts.

5.2 Prior to June 1, 1978, the affected parties shall reach agreement as to the methods and estimates to be used for pre-season and in-season run strength estimation in each region of origin.

6. **Harvest Rates.** The following rules shall govern harvest management in all salmon fisheries, except as otherwise agreed by all affected parties.

6.1 Harvests of salmon in mixed stock areas shall insure that the weakest viable stock is protected.

6.2 The maximum harvest rate for a stock or set of stocks shall be defined as follows:

$$H = \frac{S - E}{S}$$

where,

H = the maximum harvest rate
S = the numerical abundance of a defined stock or set of stocks based on the best available estimate of run size (see Section 5).
E = the sum of escapement goals applicable to the stock or set of stocks.

6.3 The maximum harvest rates in each fishing area shall be determined separately for hatchery and viable natural stocks. Of the harvest rates computed in each fishing area, the lowest rate shall prevail in the management of the area during the course of the run, provided, however, that all affected parties may agree to a lower harvest rate.

6.4 Harvest rates in each fishing area shall be agreed upon between the State and all affected Tribes on the basis of escapement goals agreed upon between the parties.

7. **Allocation of Harvest**

7.1 Shares shall be computed separately for each species and region of origin, unless otherwise agreed between all affected parties.

7.2 Both the State and the Tribes recognize that fisheries management is not sufficiently precise to provide a prescribed harvest allocation between Treaty (fishermen) and non-Treaty (fishermen) on every run each year. Therefore, if Treaty or non-Treaty fishermen are not provided the opportunity to harvest their share of any given run as provided (by the orders of this court), deficiencies in numbers of fish shall be made up during the next succeeding run of the same species whenever practicable. If necessary, the deficiency for each given year shall be distributed and made up over a series of years, not exceeding five years. Annually, prior to June 1, the parties shall agree upon recommendations regarding implementation of this

Section. This does not apply to Fraser River sockeye and pink salmon.

7.3 Catches made in Puget Sound marine waters having a mixture of stocks from two or more of the regions of origin in Puget Sound will be apportioned on the basis of comparative run size estimates for the stocks involved.

7.4 Prior catch projections by troll, and sport fisheries shall be agreed upon annually by the parties according to the following schedule:

spring chinook stocks — March 1
summer-fall chinook stocks — June 1
coho stocks — June 1

8. **Catch Recording System.** Reliable "soft" and "hard" data systems are needed for in-season fisheries management needs and for the finalizing catch and effort statistics, respectively. The "soft" data system shall provide updated current catch and effort information as frequently as is necessary for in-season management purposes.

8.1 To the extent feasible, the "hard" data shall include catch of salmon and steelhead for ceremonial and subsistence use for all fisheries of the parties.

8.2 Processing of Treaty Indian fish tickets, correction of errors in such tickets, and collection of such data shall be carried out under an agreed upon joint catch monitoring system which recognizes the need and responsibility of each Treaty Tribe to correct its own fish ticket information. Primary

emphasis will be on achieving completeness and accuracy in the initial preparation of the fish ticket.

9. **Timing and Contents of Tribal Regulations**

9.1 The parties shall cooperate to develop a system for filing, compiling, transmitting, and cross-indexing both pre-season and in-season tribal and state regulations affecting Puget Sound harvests (e.g., common files accessed by computer terminals). In cases of conflicts, the system must identify the applicable regulations.

9.2 At least twenty-one (21) days prior to a run management period, tribes shall file, either separately or in common with other affected tribes, written regulations specifying at least the areas to be managed, the beginning and duration of the run management period, any appropriate gear restrictions and estimates of the amount of each gear type to be used under the regulation.

9.3 At least twenty-four (24) hours prior to effectiveness, tribes may supplement the pre-season regulations by filing either separately or in-common with other affected tribes, written regulation modifications reflecting updated estimates of run strength specifying at least the duration and location of fishing to be conducted by each commercial gear type. This provision shall not limit the ability of tribes to promulgate emergency regulations, in accordance with prior orders of this court, for

fisheries managed by the International Pacific Salmon Fisheries Commission.

Subject to the provisions of other applicable orders of this court, the "Order Re: Rules of Procedure of Fisheries Advisory Board and Resolutions of Disputes," dated December 17, 1976, shall be and hereby is modified to permit the State of Washington to enact emergency closures of treaty right fishing for conservation purposes within twenty-four (24) hours, in cases where the tribal parties have not provided the state at least sixty (60) hours notice of the tribal emergency opening required by this order.

10. **Submission of Regional Management Plans** — Prior to June 1, 1978, all treaty tribes shall, separately or in common with other affected tribes, submit comprehensive management plans for the portions of Puget Sound waters in which their tribal fisheries are conducted. The goal of these plans shall be to achieve coordination between all affected tribes and to eliminate potential conflicts in management strategy. These regional plans of the tribes shall specifically address the provisions of this plan as to viable stocks, escapement goals for both natural and hatchery production, methods of in-season run size estimation, harvest rates and intertribal sharing, and other matters as required by this Order.

11. **Resolution of Disputes**

11.1 Disputes regarding failure to reach agreeements, or to take, or to refrain from taking,

any action required under this agreement shall be resolved as provided in the Order Re: Rules of Procedure for Fisheries Advisory Board and Resolution of Disputes, dated December 17, 1976, *United States v. Washington,* (W.D. Wash. No. 9213), except that no party may object to the jurisdiction of the Board as to matters addressed by this Plan. In addition, the parties shall choose a technical advisory committee or committees, which shall develop and analyze data pertinent to this agreement, including but not limited to the following: calculated run size for all species of fish, ocean catches, escapement goals, catches and adjustments, habitat restoration, and hatchery rearing programs. Such a committee shall make recommendations to the fishery management entities to assure that the commitments in this agreement are realized. Members shall be qualified fishery scientists familiar with technical management problems in Puget Sound. The committee shall be comprised of an equal number of representatives named by the State of Washington and the Indian Tribes, respectively.

11.2 This Plan shall in no way affect or be considered by any person, party, or court to affect the continuing jurisdiction of the United States District Court for the Western District of Washington over all issues and matters within the jurisdiction of that Court pursuant to the ruling in *United States v. Washington,* No. 9213.

11.2.1 This Plan shall in no way be considered to

change Final Decision #1 of the United States District Court for the Western District of Washington in *United States v. Washington,* No. 9213, with regard to sharing principles, usual and accustomed fishing places, treaty rights, the self-regulating status of Indian Tribes, the off-reservation jurisdiction of Indian tribal governments, the obligations of the State of Washington, the special status of on-reservation fisheries, or any other matter.

The foregoing plan is hereby adopted by the court this 31st day of August, 1977.

/s/_____
George H. Boldt
Senior, United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

vs.

STATE OF WASHINGTON, et al.,

Defendants.

CIVIL NO. 9213

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: ENFORCEMENT OF 1977 FISHERIES ORDERS

On September 27, 1977, the Court entered an Order Granting Preliminary Injunction Re: Enforcement of 1977 Fisheries. Based upon the pleadings, memoranda and affidavits submitted by the parties, the testimonial and documentary evidence admitted at a hearing held before the Magistrate on September 22, 1977, and at a hearing held before the Court on September 27, 1977, and on the oral arguments of counsel, the Court made and hereby enters the following findings of fact and conclusions of law in support of that Order.

FINDINGS OF FACT

1. In Final Decision #1 herein, this Court recognized and affirmed the responsibility of all citizens to see that the terms of the treaties involved

in this litigation are carried out. (384 F.Supp. 406 (Declaratory Judgment and Decree, ¶12).)

2. In Final Decision #1, this Court ordered the defendants to make significant reductions in the non-Indian fishery in order to assure that the treaty fishermen will have their rightful opportunity to harvest fish. (384 F.Supp. 420 (Interim Plan and Stay Order, ¶5).)

3. On August 31, 1977, this Court removed from the State of Washington all authority over the treaty harvest opportunity (except such authority as is needed to insure conservation), and further made an allocation of the 1977-1978 fish runs in Puget Sound between the treaty and non-treaty harvest opportunities. (Memorandum Order and Preliminary Injunction, August 31, 1977.)

4. Since Final Decision #1, certain non-treaty fishermen have engaged in a substantial number of violations of those state fishing regulations which were issued to comply with allocation orders of this Court and protect treaty fishing rights. (Ex. PL 130-134; Tr. 9/22/77 (Miller) pp. 47-48, 50-51, 58.)

5. A substantial number of the violations referred to Finding #4 above, did not result in criminal citations from the State of Washington or any other sanction. (Ex. PL 130; Tr. 9/22/77 (Miller) pp. 52, 61.)

6. A substantial number of the citations which were issued in response to the violations described

in Finding #4 above did not result in criminal prosecution by the State of Washington or any other type of enforcement action. (Ex. PL 130; Tr. 9/22/77 (Miller) p. 52.)

7. A substantial number of the state court criminal prosecutions which did take place as a result of violations referred to in Finding #4 above resulted in dismissals on the ground that the Department of Fisheries has no authority to issue regulations designed to comply with orders of this Court and to protect treaty fishing rights. (Ex. PL 130, 144.)

8. Decisions by the Washington Supreme Court in *Puget Sound Gillnetters Association v. Moos*, 565 p.2d 1151 (1977), and *Purse Seine Vessel Owners Association v. Moos*, No. 43938, July 1977, have apparently given approval to the state court practice of dismissing prosecutions against non-treaty fishermen. In *Puget Sound Gillnetters Association v. Moos*, the Washington Supreme Court said that the Director of Fisheries may not "allocate fish among competing claimants for purposes other than conservation," and that he may not "allocate fish to treaty Indians or to non-Indians." Those rulings prevent defendants from complying with earlier decrees of this Court in the particulars specified in Finding of Fact #6 in this Court's Memorandum Order and Preliminary Injunction of August 31, 1977, which finding is adopted herein by reference. They also prevent defendants from complying with the law as set forth in repeated holdings of the United States

Supreme Court on which this Court's decision is based.

9. As a result of the decisions of the Washington Supreme Court referred to in Finding #8, above, there have been widespread, open and intentional violations of this Court's orders (and of state regulations enacted to comply with those orders) by certain non-treaty fishermen during the current fishing season. (Ex. PL 140, 144, 146-152; Tr. 9/22/77 (Lewis) pp. 15-20; Tr. 9/22/75 (Miller) p. 58.)

10. Although the Washington Department of Fisheries has indicated that it intends to enact regulations which comply with this Court's allocation orders, it feels that such regulations will be ineffectual because of the refusal of certain county prosecutors to prosecute citations issued for violation of those regulations and the refusal of certain state courts to convict individuals who commit those violations. (Ex. PL 138, 139, 144; Tr. 9/22/77 (Miller) pp. 52, 62; Temporary Restraining Order Re: Enforcement of 1977 Fisheries, August 31, 1977, herein.)

11. Despite the violations referred to in Finding #9, above, the Department of Fisheries has not issued a single citation for violation of those state regulations. (Tr. 9/22/77 (Miller) p. 61.)

12. The State of Washington and its Department of Fisheries is, and will be, unable to enforce regulations it adopts to comply with orders of this

Court. (Ex. PL 138, 144; Tr. 9/22/77 (Miller) pp. 61-63; Tr. 9/22/77 (Lewis) pp. 22-23.)

13. This litigation has adjudicated the right of the State of Washington to authorize the harvest of anadromous fish and the rights of all its citizens to harvest those fish.

14. Because of the public nature of this litigation, implementation of the judgment depends in part on cooperation by the State of Washington and its citizens, and is vulnerable to disruption by any of a large number of individuals, whose identitites cannot practicably be specified in advance.

15. During 1975, 1976 and 1977, certain non-treaty fishermen have engaged in regular, intentional, admitted violations of this Court's orders. They have caused widespread disregard of the orderly process of law and adjudication of rights. They have frustrated the exercise of plaintiffs' federally protected treaty rights and implementation of this Court's orders designed to protect those rights, and have interfered with defendants' ability to comply with those orders.

16. Those circumstances interfere with this Court's jurisdiction over the property involved in this litigation, and specifically with its jurisdiction over the harvest opportunity reserved to the tribes by the treaties, and further interfere with this Court's ability to protect and effectuate its prior decrees.

17. The conditions described in Findings #15

and 16 above have continued and become much more severe during the current coho salmon fishing season. (Ex. PL 140, 146-152; Tr. 9/22/77 (Lewis) pp. 16-20; Tr. 9/22/77 (Miller) p. 58.)

18. Other methods used by this Court to seek compliance with its orders in this case in previous years (e.g., Preliminary Inuunction, 1975 Chum Fishing, October 27, 1975; Order Re 1976 Coho Fishery, September 6, 1976) have not succeeded in deterring violations of those orders.

19. The only reasonable method available to achieve compliance with this Court's orders and protection of plaintiffs' treaty rights is enforcement of those orders by this Court, by means of an injunction directed toward violators of those orders enforced by federal law enforcement officers.

20. This Court has always given, and continues to give, all individuals and groups who desire to be heard in this case an opportunity to present their positions and arguments. Attorneys for the groups which represent non-treaty fishermen were served with the pleadings and with notice of the hearings which culminated in entry of these findings, conclusions and orders.

21. The interests of non-treaty fishermen continue to be adequately, ably and vigorously advocated by the State of Washington, its Department of Fisheries and its attorneys.

22. Injunctive relief is necessary to prevent irreparable injury to the plaintiff tribes and their members.

23. Injunctive relief is necessary in aid of this Court's jurisdiction and to protect and effectuate this Court's prior judgments.

24. Plaintiffs have no adequate remedy at law.

CONCLUSIONS OF LAW

1. An allocation of the fishing opportunity between treaty and non-treaty fishermen, and enforcement of that allocation, is an appropriate exercise of this Court's discretion. *Department of Game v. Puyallup Indian Tribe,* 414 U.S. 44 (1973); *Puyallup Indian Tribe v. Department of Game,* 97 S.Ct. 2616 (1977); *United States v. Washington,* 520 F.2d 696 (9th Cir., 1975).

2. This Court has the authority and the duty to protect and effectuate its prior judgments. *Brown v. Board of Education,* 394 U.S. 294 (1955); *Cooper v. Aaron,* 358 U.S. 1 (1958); *Bullock v. United States,* 265 F.2d 683 (6th Cir.) *cert. den.,* 360 U.S. 909 (1959).

3. This Court has broad discretion to fashion remedies which will protect and effectuate its earlier rulings, the more so when the public interest and the rights of a large group of people are involved. *Virginia Railroad Co. v. System Federation,* 300 U.S. 515 (1937); *Golden State Bottling Co. v. N.L.R.B.,* 414 U.S. 168 (1973); *Bullock v. United States, supra.*

4. This Court is empowered to issue all writs necessary or appropriate in aid of its jurisdiction

which are agreeable to the usages and principles of law. 28 U.S.C. §1651.

5. This Court is empowered to punish disobedience or resistance of its lawful orders and decrees. 18 U.S.C. §401.

6. In limited and extraordinary circumstances, this Court may enjoin individuals who are not parties to this action where they have notice of this Court's orders, they intentionally violate those orders, where they are members of a class who cannot realistically be specified in advance of such violations, and their actions violate the rights of a large class of plaintiffs, interfere with the obligations and ability of defendants to comply with this Court's orders, create conditions of lawlessness and chaos in the community and interfere with this Court's ability to adjudicate the rights and responsibilities of the parties before it. *Kasper v. Brittain,* 245 F.2d 92 (6th Cir.), *cert. den.* 355 U.S. 834 (1957); *Bullock v. United States, supra*; *United States v. Hall,* 472 F.2d 261 (5th Cir. 1972).

7. This Court may enjoin individuals who are not parties to the lawsuit when they are in privity with one of the parties; that is, when the party is representing the interests and advocating the position of the non-party. *City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 340-1 (1957); *New Jersey v. New York,* 345 U.S. 369 (1953).

8. The orders of this Court directed toward the State of Washington are binding on its citizens. *City*

of Tacoma v. Taxpayers of Tacoma, 357 U.S. 321 (1957); *Wyoming v. Colorado,* 286 U.S. 494 ( ); *New Jersey v. New York,* 345 U.S. 369 (1953); *Kentucky v. Indiana,* 281 U.S. 163 (1930).

9. This Court may enjoin interference with property which is under the control of this Court, and punish violations of such injunctions. *United States v. Dean Rubber Manufacturing Co.,* 71 F.Supp. 96 (W.D. Mo. 1946); *In re Lustron Corp.,* 184 F.2d 789, 798 (7th Cir. 1950), *cert. den.,* 340 U.S. 946 (1951); 7 Moore's Federal Practice ¶65.13, n.1 (1976).

DATED this 27th day of September, 1977.

/s/_____
George H. Boldt
Senior, United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

CIVIL NO. 9213

PRELIMINARY INJUNCTION RE:
ENFORCEMENT OF 1977 FISHERIES

Upon the motion of the United States, the affidavits in the record, the testimony of witnesses, together with the records and files of this case, the Court finds that the State of Washington remains unwilling or unable to control the non-treaty fishermen so as to be in compliance with the orders of this Court by providing treaty Indians with the opportunity to catch their share of the returning salmon.

The Court further finds that this situation, if permitted to continue, will lead to a breakdown of law and order in the case area, the substantial denial of federally guaranteed treaty fishing rights and will endanger the preservation of the fishery resource.

Therefore, it is hereby ORDERED that:

1. All Puget Sound and other marine waters

easterly of Bonilla Point-Tatoosh line and their watersheds, all Olympic Peninsula watersheds, and all Grays Harbor and its watersheds are hereby closed to all net salmon fishing except during such times and such specific waters as are opened by State or tribal regulations or regulations of the United States conforming to the orders of this Court in this case.

2. All reef net, gill net and purse seine fishermen licensed by the State of Washington, all other persons who attempt to net or assist in netting salmon in the waters described in paragraph 1, the Puget Sound Gillnetters Association, the Purse Seine Vessel Owners Association, the Grays Harbor Gillnetters Association and all persons in active concert or participation with them are hereby enjoined and prohibited from engaging in taking, possessing, or selling salmon of any species taken from such waters, unless such person has first ascertained from the Washington Department of Fisheries telephone "hot-line", 1-800-562-5672 or 1-800-562-5673, that the area to be fished is open for fishing by non-treaty fishermen at the time the individual intends to fish, *provided,* that this provision shall not apply to persons exercising treaty fishing rights in accordance with the orders of this Court.

3. The defendant State of Washington is directed to maintain a continuous telephone hot-line service free of charge to any caller from within the

State of Washington to provide information on areas within the waters described in paragraph 1 of this order that are open to net salmon fishing by non-treaty fishermen in conformity with the orders of this Court. The defendant shall furnish to this Court and to the United States Attorney a transcript of the daily hot-line messages.

4. The defendant State of Washington is ordered and enjoined to commence immediately to serve by certified mail return receipt requested or otherwise copies of this preliminary injunction on all state-licensed commercial salmon net fishermen, and any other person found to be engaged in net fishing for salmon or assisting in such fishing, and to furnish the Court with proof of service or written statement of the reason for the inability to serve any particular licensee. The United States, through the Coast Guard, the National Marine Fisheries Service, the United States Marshal's Service, and such other agencies as may be appropriate, may serve copies of the preliminary injunction on all such persons.

5. Defendant State of Washington is ordered and the United States is directed to cite any fishermen who, having received notice of this order, thereafter engages in fishing or assisting with fishing in violation of the provisions of this order to appear before the United States District Court to be ordered to show cause why he should not be held in contempt.

6. The issuance of a Preliminary Injunction is

necessary to prevent irreparable injury to the plaintiff tribes and their members and to the salmon resource.

7. The issuance of a Preliminary Injunction is necessary in aid of this Court's jurisdiction and to protect and effectuate this Court's prior judgments.

This Preliminary Injunction shall remain in effect until further order of this Court.

IT IS HEREBY SO ORDERED this 27th day of September, 1977.

/s/_____
George H. Boldt
Senior United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

vs.

STATE OF WASHINGTON, et al.,

Defendants.

CIVIL NO. 9213

PRELIMINARY INJUNCTION ORDER

This matter having come on before the Court on the motion of the United States, and certain plaintiff intervenor tribes for a preliminary injunction notice of this hearing having been given by the Court on October 8, 1977, and the Court having carefully considered the records and files of this case, and especially the record of the proceedings of August 31, 1977, September 27, 1977, and September 28, 1977, together with the arguments of counsel, the Court finds and concluded as follows:

1. On August 31, 1977, this Court entered an Order removing the treaty allocation of salmon from the jurisdiction of the State of Washington and enjoining the State to issue regulations which would not permit non-treaty fishermen in the case area from catching in excess of fifty-five percent of the coho salmon and fifty percent of the chum salmon during 1977. The Court by and through its August 31, 1977, Order specifically allocated the salmon

between treaty and non-treaty fishermen as above set out.

2. In order to insure proper enforcement of this Court's orders allocating fish between treaty and non-treaty fishermen, the Court entered an additional order on September 27, 1977, which held in part as follows:

> The defendant State of Washington is directed to maintain a continuous telephone hotline service free of charge to any caller from within the State of Washington to provide information on areas within the waters described in paragraph 1 of this order that are open to net salmon fishing by non-treaty fishermen in conformity with the orders of this Court. The defendant shall furnish to this Court and to the United States Attorney a transcript of the daily hotline messages.

3. On September 28, 1977, this Court allocated the available salmon harvest in Grays Harbor so as to provide treaty Indians with 45% of the chinook and coho and 50% of the chum which returned during 1977, and further ordered that the State promulgate regulations which would be consistent with the Court's designated allocation.

4. This Court in entering its orders of August 31, September 27, and September 38, [*sic*] was attempting to provide for the implementation of this Court's decision of February 12, 1974, recognizing, but not necessarily condoning the contrary interpretations of the law issued by various State Courts. This Court attempted throughout the proceedings to frame the orders in such a way as to preserve as much

management discretion and authority with the State of Washington as was possible and still provide for the protection of the federal treaty right, which is the supreme law of the land.

5. Each of the orders above came in response to specific state action, which if left uncorrected would make it impossible for treaty Indians to harvest the allocation decreed by this Court. The Court has found that treaty Indians would suffer irreparable harm if they were not provided with additional and exclusive fishing opportunity so that they can have the opportunity to catch their determined share of the salmon run. Nothing has been presented to the Court today which would in any way modify this Court's opinion that the Plaintiff intervenor tribes, and their respective treaty Indian fishermen would continue to suffer irreparable harm unless this Court acts to further implement its prior orders.

5. The State of Washington has attempted to promulgate regulations consistent with this Court's orders of August 31, September 27, September 28, 1977, subsequent to the issuance of those orders. However, on two occasions pursuant to suits brought by the non-treaty commercial fishermen and their associations the Superior Court of Thurston County has issued orders to the State ordering them not to comply with this Court's orders. This Court has been forced to enjoin the orders of the Superior Court of Thurston County which have frustrated the State's efforts to comply with this Court's orders.

6. On October 6, 1977, Chief Justice Charles T. Wright, of the Supreme Court of the State of Washington on motion by the Grays Harbor Gillnetters Association issued an extraordinary writ against the Washington State Department of Fisheries. The Washington Department of Fisheries has incorrectly interpreted that order as requiring it to violate this Courts' orders of August 31, September 27, and September 28. The Washington Department of Fisheries promulgated regulations which were inconsistent with these prior rulings. Additionally the Washington Department of Fisheries removed from the State telephone hotline information required by this Court's order of September 27, 1977, thus making it impossible for the federal enforcement agencies to enforce this Court's orders.

7. This Court has examined Judge Wright's order of October 6, 1977, and finds that it is consistent with this Court's previous orders. The order does not in any way dictate that the Washington Department of Fisheries need or must deviate from complete compliance with this Court's orders.

8. The State notwithstanding its legal ability to comply with both Judge Wright's order and this Court's orders, has exhibited the intention to continue to approve non-treaty fisheries that will deprive treaty fishermen of their opportunity to harvest their allocation. This Court hereby determines that the only alternative remaining to this Court to insure complete compliance with this Court's previous orders, and with Final Decision #1, is to remove from the State of Washington the power to issue certain regulations. This step is taken reluctantly and only after repeated showings on the part of the State of Washington that they are unable, or unwilling to adopt regulations in a consistent manner which would comply with this Court's prior orders. Therefore, this Court must enter the following relief:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Washington Department of Fisheries, its officers, agents, attorneys, and servants, are enjoined from announcing or publishing via the telephone hotline, telephone numbers 1-800-5672 [*sic*] or 1-800-562-5673 or any other means, any non-treaty net fishery for salmon in the area defined as that portion of the State of Washington west of the Cascade Mountains and north of the Columbia River and Willapa Harbor drainage areas, and including the United States portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula including the Grays Harbor watershed, and the off-shore waters adjacent to those areas. Provided, the Washington Department of Fisheries may continue to announce a non-treaty net commercial fishery in areas 7B, and 7C for coho salmon. The Washington Department of Fisheries is further

enjoined not to announce any additional non-treaty net commercial fisheries except in compliance with the provision of this order. The Washington Department of Fisheries shall cause to be placed upon the telephone hotline information that non-treaty fishermen fishing in State of Washington management areas, within said area as above defined, that are not declared open on the hotline shall be subject to the contempt powers of the United States District Court. The Washington Department of Fisheries shall not allow any other information to be placed on the hotline which would say or suggest that non-treaty fishing may proceed in any other areas. Specifically, in the telephone hotline information, the Department of Fisheries shall make no distinction between closures instituted by order of this court or closures instituted by the Department of Fisheries or those instituted for conservation, or to meet allocation needs, nor shall the State of Washington make any distinctions between regulations or closures that would be enforced by the State of Washington and those which may be enforced by others.

2. The Washington Department of Fisheries its officers, agents, attorneys, and servants are enjoined not to adopt or promulgate any regulation that would open a non-treaty net commercial salmon fishery in waters of the area as above defined. Provided, that the Washington Department of Fisheries may **close** any fishery when necessary for the actual preserva-

tion of a particular salmon run, consistent with previous orders of this Court. The Washington Department of Fisheries may propose to this Court through the Fisheries Advisory Board appropriate gear and season openings for non-treaty fishermen, consistent with this Courts' previous orders. Upon recommendation to the court by the Fisheries Advisory Board or the Court's Technical Advisor that such non-treaty fishery would be appropriate, such opening may be placed on the telephone hotline.

3. The Washington Department of Fisheries, its officers, agents and servants, are further enjoined to serve copies of this Court's Preliminary Injunction of September 27, 1977, upon all persons found to be engaged in net fishing for salmon and any person assisting in such fishing, and file with this Court proof of such service; provided, that this order shall not be served upon treaty fishermen.

4. The Washington Department of Fisheries its officers, agents and servants, are further enjoined to cite any non-treaty fisherman who, having received notice of this Court's order of September 27, 1977, thereafter engaged in any fishing or assisting with fishing in violation of the provisions of the September 27, 1977, Order and shall direct such persons to appear before the United States District Court to be ordered to show cause why he or she should not be held in contempt.

Dated this 17th day of October, 1977.

/s/_____
Honorable George H. Boldt
Sr. U.S. District Court Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

CIVIL NO. 9213

PRELIMINARY INJUNCTION STAYING
THURSTON COUNTY SUPERIOR COURT

Upon the application of the United States and the Quinault Indian Tribe, notice having been given to the State of Washington, the Honorable Frank Baker, Superior Court, Thurston County, and the Thurston County Prosecuting Attorney, and the Court having carefully considered the records and files of this case, together with the arguments of counsel, finds that:

1. On September 28, 1977, this Court ordered the defendants State of Washington and Gordon Sandison, Director of the Department of Fisheries, to regulate the salmon harvest in Grays Harbor so as to not interfere with the opportunity of the treaty Indians to catch 45% of the chinook and coho and 50% of the chum which will return during 1977. That order was issued after the Court considered testimony presented before United States Magistrate John L. Weinberg on September 16, 1977, and before

this Court on September 28, 1977, together with arguments of counsel. The Court found, and continues to find, that irreparable harm would be suffered by the plaintiff treaty Indians if the allocation which has been ordered is not implemented. In that event, the plaintiff treaty Indians would be unable to catch their treaty entitlement of fish in 1977.

2. On October 4, 1977, the Superior Court for Thurston County, in *Grays Harbor Gillnetters Association v. Sandison,* Cause No. 58462, ordered the defendants to promulgate emergency regulations which would not restrict commercial salmon fishing in Grays Harbor except for conservation and to disseminate those regulations over the Washington State Department of Fisheries "hotline." Such action by the State would have been directly contrary to this Court's orders to the defendants of August 31, 1977 (Preliminary Injunction Staying State Court Injunction and Order Implementing Preliminary Injunction), September 28, 1977 (Order Allocating Salmon Catch in Grays Harbor), and October 8, 1977.

3. The State of Washington has previously promulgated regulations which are consistent with this Court's orders allocating the salmon catch in Grays Harbor. If the State enacts and publicizes new regulations which do not allow treaty Indians to catch their full share of salmon, the plaintiff treaty Indians will suffer irreparable harm and non-treaty

fishermen who are prohibited from fishing contrary to State allocation regulations which permit treaty Indians to harvest their full share of the salmon could be allowed to resume fishing contrary to that allocation thus enforcement of the Court's preliminary injunction of September 27, 1977, which is directed at the fishermen might be frustrated. Additionally, the State has been enjoined from adopting any salmon fishing regulations, other than closures for conservation, by this Court's order of October 8, 1977.

THEREFORE, IT IS HEREBY ORDERED that the Superior Court of the State of Washington, County of Thurston, is hereby enjoined and prohibited from in any manner or to any extent enforcing the temporary injunction issued by said Court (per the Honorable Frank Baker) on October 4, 1977, in Cause No. 58462, and from issuing any other order in said cause, or in any other cause, which will have the effect of preventing the State of Washington, the Washington State Department of Fisheries, or their officers and agents, from fully complying with the orders of this Court.

The defendants State of Washington, Gordon Sandison, the Department of Fisheries and Game of the State of Washington, and their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with any of them, are hereby relieved from any obligation to comply with the orders of the Thurston County Superior

Court for the State of Washington in Cause No. 58462 and are ordered not to obey, carry out, enforce or otherwise treat as having any lawful effect on the orders of that Court which are contrary to the orders of this Court.

This order shall remain in effect until a trial shall be held on the merits or until further order of this Court.

DATED this 17th day of October, 1977.

/s/_____
George H. Boldt
Senior United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

CIVIL NO. 9213

FOURTH SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE RE 1975 FRASER RIVER SOCKEYE AND PINK SALMON HARVEST

This matter having come on regularly before the Court on Plaintiff United States' Motion for Preliminary and Permanent Injunctions, and the Court having considered the testimony and other evidence admitted and the memoranda and oral arguments of counsel, makes the following Findings of Fact and Conclusions of Law in addition to those heretofore entered in this case, particularly Findings of Fact Nos. 214, 215 and 216 entered February 12, 1974 (384 F.Supp. at 392-393) and to the Ruling on Department of Fisheries Question #18 (384 F.Supp. at 411) and on the basis thereof renders the following Decree:

DEFINITIONS

As used herein the terms—

"Convention" means the Convention for the

Protection, Preservation and Extension of the Sockeye Salmon Fisheries of the Fraser River System, entered into by the United States and Canada and signed at Washington on the 26th day of May, 1930 (50 Stat. 1355; TS 918) as amended by the Pink Salmon Protocol signed at Ottawa on the 28th day of December, 1956 (8 UST 1057; TIAS 3867) (Ex. USA-79; USA-80).

"Commission" means the International Pacific Salmon Fisheries Commission (IPSFC) established pursuant to the Convention.

"Convention Waters" means those waters described in sections 1, 2 and 3 of Article I of the Convention of May 26, 1930.

"U.S. Convention Waters" means those Convention Waters located in or under the fisheries regulatory control of the United States.

"Period of Commission control" means, with respect to any portion of U.S. Convention Waters, the 1975 period that such portion is under the regulatory control of the Commission. As of the date of this Order said period is from June 26, 1975, to September 20, 1975, inclusive, for U.S. Convention Waters between the Bonilla-Tatoosh line and the Angeles Point-William Head line and from June 26, 1975, to September 27, 1975, for certain of those waters east of the latter line plus the period September 28, 1975, to October 11, 1975, inclusive, for an area near Point Roberts as described in the Commission's recommendation regulations. (Ex. USA-77.)

FINDINGS OF FACT

271. The International Pacific Salmon Fisheries Commission has adopted recommendations and the United States Government has approved those recommendations for restrictions on the commercial taking of sockeye and pink salmon in certain Convention Waters including those comprising Washington Department of Fisheries, Puget Sound Salmon Fishing Areas 1, 2, western portion of 3, and western portion of 8, as defined in WAC 220-47-201, WAC 220-47-202, WAC 220-47-203 and WAC 220-47-209, during the 1975 period of Commission control. (Ex. JX-2a, Fig. 18, p. 254; Ex. USA-77.) The Washington Director of Fisheries, after a public hearing, adopted regulations implementing the Commission's recommendations. (Ex. USA-78.) Neither the Commission's recommended regulations nor the Director of Fisheries' regulations make any specific reference to or distinctive provisions for fishing by treaty Indians at their usual and accustomed fishing places.

272. In transmitting the Commission's 1975 recommendations to the Washington Director of Fisheries for implementation the United States Department of State, on behalf of the U.S. Government, advised the Director as follows:

> "In light of the decision in *U.S. v. Washington*, regulation in conformity with Indian Treaty rights, as set forth in that decision, is now required. It is understood, in view of this decision, that the State will regulate in a manner consistent with Indian Treaty rights."

"In this regard, the United States has reached an understanding with the Government of Canada which we believe will ensure sufficient flexibility in the Commission to accommodate domestic implementation of that decision. Specifically, should action to implement the decision, through means such as restrictions of fishing on certain U.S. fishing days to Indian fishermen, create a situation in which effort by the Indians is insufficient to permit the U.S. fishery to reach the catch goals set by the Commission, then the Commission could take action to remedy this imbalance by providing extra time to assure that the targets are reached. Thus, regulation by the State of Washington in conformity with the Boldt decision can be undertaken in a manner consistent with the overall obligations of the U.S. under the Convention." (Ex. USA-77.)

273. The Commission takes the position that while it is aware that changes in units of gear and in fishing effort have occurred in different segments of the industry and that these changes sometimes affect individual catches, the Commission does not directly concern itself with these matters. The Commission fulfills its responsibilities to assure proper spawning escapement and to divide the allowable catch in Convention Waters by considering the catches that are made, and not by setting the number of days of fishing in the abstract. The number of days allowed for fishing need not be, and often is not, the same for each country. The Commission has no jurisdiction over the numbers or types of gear that may be operated

in Convention Waters. Jurisdiction over these matters rests with the respective national or state or provincial governments as matters of domestic law. (Ex. USA-89.)

274. The best available estimates of the number of treaty Indian gear that are likely to be use in U.S. Convention waters during the 1975 period of Commission control, as compiled by the Northwest Indian Fisheries Commission from treaty tribes having treaty-right usual and accustomed fishing places within those waters, are 65 large gill net boats, 39 gill net skiffs and 4 purse seine vessels. (Ex. USA-84.)

275. In 1974 the number of units of United States gear landing sockeye during the period of Commission control was 272 purse seines, 1140 gill nets and 54 reef nets. (Ex. USA-85.)

276. The 1974 Fraser River sockeye run totalled 8.5 million fish and the Convention Waters catch was 5 million fish, of which U.S. fishermen caught 2,476,053 (Ex. USA-86) and Canadian fishermen caught 2,500,019. The Indian portion of the United States catch was 34,277 (Ex. USA-86). Pink salmon runs occur only in odd numbered years. (Ex. USA-86.)

277. The Commission presently forecasts a 1975 convention waters run of 5.5 million Fraser River sockeye.

278. A regulation by the State of Washington or its Director of Fisheries limiting fishing

in U.S. Convention Waters to treaty Indians for at least one day per calendar week of the days on which fishing in such waters is authorized by the Commission during 1975 would not adversely affect the conservation of any species or run of fish under normal fishing patterns, deny non-Indians an opportunity to take up to 50% of the harvestable fish available at the Indian treaty usual and accustomed fishing places, or adversely affect any obligation of the United States under the Convention with Canada. Such a regulation is appropriate "to approach more nearly an equal allocation of the opportunity to harvest fish at usual and accustomed grounds and stations" as required by Final Decision #1 in this case, 384 F.Supp. at 344.

279. The International Pacific Salmon Fisheries Commission controls the convention water harvest of sockeye and pink salmon by adopting recommended regulations several months in advance of the season which are submitted for approval by the respective national governments and thereafter, as a matter of practice, for Washington waters, for adoption by the Washington Department of Fisheries. Thereafter that Commission staff closely monitors the actual runs and catches throughout the season and the Commission meets or confers sometimes by telephone, frequently throughout the season to adopt such changes to the

pre-season regulations as necessary. These become effective without the necessity for further approval by the national governments and, for Washington waters, are customarily placed in effect through their promulgation by the Director of Fisheries as emergency regulations. In 1973 the Commission met over thirty times during the 113 day period of Commission control.

280. The Canadian Government has indicated that it will not consider it contrary to United States' obligations under the Convention if the State of Washington or its Director of Fisheries authorizes, during periods of Commission control in 1975, a fishery in U.S. Convention Waters that is less extensive than the fishery authorized by the Commission, so long as such action has not been shown either to prevent the Commission from assuring a proper escapement to the spawning grounds of Fraser River sockeye and pink salmon, or to preclude an equal division of the harvestable catch as between Canada and the United States or to unduly burden the Government of Canada in fullfilling its obligations or realizing the benefits due its citizens under the convention.

281. On or about July 10, 1975, the Director, Washington Department of Fisheries, contacted the United States Department of State, outlining four alternative proposals for action by

the State of Washington, with respect to its fisheries under the jurisdiction of the Commission. The Director therein requested guidance as to whether any or all of these alternatives would be consistent with the obligations of the United States under the convention. The State Department, by William L. Sullivan, Jr., after consultations with the Canadian Government, responded to the Director by cable on July 11, 1975, to the effect that the first alternative (extra days for treaty Indian fishermen) would be objectionable to the State Department; that the second alternative (restricting non-Indian fishing more than the Commission's regulations would otherwise require), would be acceptable thereto; that the third alternative (allowing all treaty Indians to fish with any gear whenever the Commission allowed fishing by any United States fishermen), was not objectionable in principle, although some technical changes in the Commission's regulations might be necessary; and that the State Department had no legal objection to the fourth alternative (closing down the United States' non-Indian fishery) although it might seem to violate the spirit of the convention. (Ex. USA-90.) Further, the State Department sent a subsequent telegram to the Director, State of Washington Department of Fisheries, stating that, at the present time, the State Department is opposed to the third

alternative given existing Commission regulations, but not indicating that the State Department's lack of objection in principle thereto had been changed.

282. In light of the need to provide for Indian treaty fishing rights, and with regard to the management scheme of the commission, of all of the alternatives presented to the Court and practically available to this Court at this time for meeting that need, the one which would cause the least disruption to the Commission's management scheme and to the non-Indian fishery would be one allowing treaty Indians to fish with any gear whenever the Commission's regulations would allow fishing by any United States fishermen in all Convention Waters except State Area 2 and a regulation allowing fishing in State Area 2 at least five days a week.

283. It has not been clearly established that a violation of the responsibilities of the United States under the convention would occur if the fishery management authorities of the treaty Indian tribes were to allow treaty Indian fishermen to fish with any gear whenever the Commission's regulations would allow fishing by any United States fishermen.

[Conclusions of law omitted.]
Dated _____

CONCLUSIONS OF LAW

55. The Sockeye Convention of May 26, 1930, between the United States and Canada, as amended by Pink Salmon Protocol of December 28, 1956, does not require the State of Washington to open its fisheries in U.S. Convention Waters, or any portion thereof, to all Washington fishermen or any specific group or category of Washington fishermen during all or any portion of the times when the Commission-prescribed regulations authorize fishing in such waters. A Washington regulation prohibiting fishing by persons who are not treaty Indians during certain portions of the fishing time allowed by the Commission or in portions of the U.S. Convention Waters within which fishing is not prohibited by the Commission would not necessarily be in conflict with the Convention or the United States' obligations under the Convention.

56. The Convention does not confer any rights on Washington non-Indian fishermen to a greater share of fish taken in Washington waters than they would have under the earlier treaties of the United States with the Indians.

57. The State of Washington and its Director of Fisheries may, consistent with the United States' obligations under the Convention and the 1975 regulatory recommendations of the Commission approved by the United States, allow fishing only to treaty Indians during certain times or in certain areas authorized to be open to fishing by such approved

regulatory recommendations so long as such action has not been shown either to prevent the Commission from assuring a proper escapement to the spawning grounds of Fraser River sockeye and pink salmon, or to preclude an equal division of the harvestable catch as between Canada and the United States or to unduly burden the Government of Canada in fulfilling its obligations or realizing the benefits due its citizens under the convention.

58. The management authorities of the various Indian treaty fishing tribes may allow any of their fishermen to fish, in Convention Waters except State Area 2, with any gear whenever the Commission's regulations would allow fishing by any United States fishermen; and in State Area 2 for five days per week.

59. The Director of Fisheries may so allocate the fishing times authorized by the International Pacific Salmon Fisheries Commission for waters of the State of Washington that are under Commission control as to come as close as possible toward meeting the twin objectives prescribed by this Court's Orders of February 12, 1974, and March 22, 1974, affording to Indian treaty fishermen an opportunity to take up to 50% of the U.S. share of the harvestable fish and to still permit a full U.S. harvest of said harvestable quota.

DECREE

Now therefore it is HEREBY DECREED, ADJUDGED AND ORDERED as follows:

1. It is necessary for proper enforcement of state and tribal regulations that may be promulgated to carry out the Orders of this Court that the number and identity of boats and gear used in the treaty Indian fishery be known to state, tribal and federal enforcement authorities. Accordingly, no boat or fishing gear shall be used in the exercise of Indian treaty rights with respect to any fishery or in any area over which the IPSFC is exercising control until such boat or gear has been specifically registered with and its use in such fishery or area authorized by the tribal authorities of the user's tribe and notice of such registration and authorization has been given by the tribal authorities to the Washington Department of Fisheries and the Regional Director of the National Marine Fisheries Service. Such offices shall also be immediately notified of the cancellation or suspension of any such registration or authorization. The registration and notice shall contain at least the following information: name and address of the owner and operator; type and name, if any, of the vessel; tribal identification number; type of gear to be used; and area or areas for which registered. No boat or unattended gear shall be used in the exercise of Indian treaty rights with respect to any fishery or in any area over which the Commission is exercising control unless there is affixed to it an identification tag, the style and type of which and the location at which affixed shall have been previously agreed to by the Director,

Washington Department of Fisheries. Use of any vessel or gear in violation of this paragraph may be subject to the provisions of state law or regulation applicable to nontreaty fishermen.

2. The Defendants State of Washington, Washington Department of Fisheries, and Donald W. Moos, its Director, are HEREBY ENJOINED from allowing any fishing, authorized by the 1975 regulations of the International Pacific Salmon Fisheries Commission by persons not entitled to exercise Indian treaty rights pursuant to the Decrees of this Court, until the Department of Fisheries adopts and files with this Court regulations within the limitations required by the regulations of said Commission as they may from time to time be modified, and which conform with this Court's Orders that defendants must, to the extent consistent with permitting the full permissible total harvest, afford treaty Indians an opportunity to take an equal share of the total number of harvestable fish which, absent the fishing activities of other citizens, would be available for harvest at their usual and accustomed fishing grounds within Washington waters, or must otherwise equitably adjust the treaty Indians' share of other species or in other areas to compensate them for disproportionate numbers of fish taken by other Washington citizens under regulations issued by said Commission.

3. Said Defendants are directed to file with this Court and serve on the following participating tribes

— to wit, the Makah Tribe, Lower Elwha Band Clallam Tribe, Port Gamble Band Clallam Tribe, Suquamish Tribe, Lummi Tribe, Nooksack Tribe, the Swinomish Indian Tribal Community and Tulalip Tribe — the United States, and the United States Commissioners of the International Pacific Salmon Fisheries Commission, copies of such regulations by July 1, 1975, and to thereafter similarly file and serve within 24 hours after adoption any changes or supplementary regulations that may be adopted as a result of any modification to the Commission's regulations.

4. The treaty Indians' opportunity to take fish up to the share specified in Final Decision #1 and the related Orders of this Court shall be taken into consideration in making any equitable adjustments or with respect to other fisheries subject to state regulatory control.

5. Regulatory restrictions prescribed by the Commission limit somewhat the latitude of means that will be available to the state and the tribes for achieving the allocation of fish in accordance with the Stevens treaties. This makes it particularly necessary that the tribes and the state regulatory agency retain and promptly exercise, when appropriate, the authority and capability to enact on an emergency basis, and place into immediate effect, subject to limitations prescribed by this Court, additional openings or closures or other modifications to their respective regulations that in

conjunction with the permissible regulations of the other parties and the applicable provisions of the Commission requirements will reasonably assure protection, proper harvest, and the allocation of, or compensatory adjustments from, the fishery resource within the state's total regulatory authority required by this and prior Orders of this Court in this case. Accordingly, this Court retains continuing daily jurisdiction over the implementation of this Order and Decree. Any party hereto or any other person aggrieved by any action or failure to act on the part of another party pursuant to this Decree shall bring the matter to this Court for an appropriate Order to implement the requirements of this Decree. Consideration of such matters will be given on a highly expedited basis by the Court, particularly if it develops that the Commission or the Canadian Government raises serious objection hereto, or if the effective implementation of the Commission's management responsibilities is hindered hereby. The Master is hereby authorized and directed, subject to the provisions of Rule 53, Federal Rules of Civil Procedure, to act upon any request for relief at any time that the undersigned Judge is unavailable to give timely consideration to the request.

6. The Court retains the authority to modify or terminate the provisions of these Findings, Conclusion and Decree, and the Order signed this day implementing such, either on its own initiative or on motion of any party, whenever it appears to

the Court that such change is necessary or appropriate to conform to the holding of Final Decision #1 or comply with the obligations of the United States under the International Sockeye Convention and Pink Salmon Protocol.

DATED this 16th day of July, 1975.

/s/ George H. Boldt
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al.,
Plaintiffs,

v.

STATE OF WASHINGTON, et al.,
Defendants

CIVIL NO. 9213

MODIFICATIONS AND ADDITIONS TO FOURTH SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE AND INJUCTION RE 1975 FRASER RIVER SOCKEYE AND PINK SALMON HARVEST

THIS MATTER having come on regularly before the Court on plaintiff United States' Motion for Modification of Injunction, and the Court having considered the memoranda and oral arguments of counsel, amends the Findings of Fact and Conclusions of Law and Decree entered in this case on July 16, 1975, as follows:

FINDINGS OF FACT

1. Finding of Fact No. 282 is amended to read as follows:

282. In light of the need to provide for Indian treaty fishing rights, and with regard to

the management scheme of the Commission, of all of the alternatives presented to the Court and practically available to this Court at this time for meeting that need, the one which would cause the least disruption to the Commission's managment scheme and to the non-Indian fishery and which would not violate the responsibilities of the United States under the Convention would be one allowing treaty Indians to fish with any gear whenever the Commission's regulations would allow fishing by any United States fishermen in Convention Waters.

2. A new Finding of Fact is made as follows:

284. On July 11, 1975, representatives of the governments of the United States and Canada met in Bellingham, Washington, to attempt to reach some agreement which would allow implementation of this Court's Injunction of July 16, 1975. However, the Canadian government would not agree to proposals put forward by the United States. Subsequent thereto, the United States temporarily withdrew its approval under the Convention of those parts of the Commission's regulations which seek to allocate the open fishing periods among various types of gear.

CONCLUSIONS OF LAW

1. Conclusion of Law No. 58 is amended to read as follows:

58. The management authorities of the various Indian treaty fishing tribes or the State of Washington may allow treaty Indian fishermen to fish, in Convention Waters, with any gear whenever the Commission's regulations would allow fishing by any United States fishermen.

2. New Conclusions of Law are added as follows:

60. The temporary withdrawal by the United States of its approval under the Convention of those parts of the Commission's regulations which seek to allocate the open fishing periods among various types of gear is a valid exercise of its rights and responsibilities under the Convention.

61. The Commission may prohibit all fishing within Convention waters but Commission regulations do not preclude the State from allocating the time allowed United States fishermen among various user groups.

62. The Commission regulations, as approved by the United States, allow fishing time without regard to gear limitations.

63. The Stevens treaties between the United States and the various Indian tribes, as interpreted by the Court and the Ninth Circuit Court of Appeals, preempted State control of fishing within Washington territorial waters in Puget Sound, including Fraser River sockeye and pink salmon, and made it the supreme law of the land that the Indians must be allowed the opportunity to take up to fifty per cent of the fish that may be legally harvested in Washington territorial waters.

64. Through federal preemption of State regulation of Indian fishing at treaty fishing grounds, this Court has jurisdiction to suspend, modify, or substitute State regulations.

65. The Washington Director of Fisheries has authority under State law to adopt regulations of the Commission and, under order of this Court, to allocate the United States' share

of Fraser River sockeye and pink salmon among user groups.

66. The adoption of regulations as required by this Court's order of July 16, 1975, modified July 30, 1975, is a valid exercise of the authority delegated to the Director by the State Legislature as limited by this Court.

DATED this 6th day of August, 1975.

/s/_____
George H. Boldt
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al.,
Plaintiff,

SWINOMISH INDIAN TRIBAL COMMUNITY,
Plaintiff-Intervenor,

vs.

STATE OF WASHINGTON, et al.,
Defandants.

CIVIL NO. 9213

PRELIMINARY INJUNCTION RE SWINOMISH INDIAN TRIBAL COMMUNITY CHINOOK FISHERY IN AREA DESIGNATED WEST BEACH

This matter having come on for hearing before this Court on the motion of the Swinomish Indian Tribal Community for Preliminary and Permanent injunction on July 30th, 1975 and continued for further hearing on August 6, 1975, and evidence having been introduced and the Court finding that the Swinomish Indian Tribal Community fishermen have been and desire to continue fishing for chinook salmon in the area designated as West Beach, which is in convention waters over which the International Pacific Salmon Commission has jurisdiction insofar as sockeye and pink salmon are concerned and that

the State of Washington has issued a citation for fishing for chinook salmon to a member of the Swinomish Indian Tribal Community fishing in this area and the Court from the evidence further finding that fishing with a large mesh net results in an incidental catch only of sockeye or pink salmon which is so small in number as not to interfere with the management of the sockeye and pink salmon resource and

The Court conluding that the Treaty between the United States and Canada governing the fishing relates to the regulation of fishing for sockeye and pink salmon, and that the Swinomish Indian Tribal Community fishermen should be allowed to fish for chinook under regulation safeguarding the sockeye and pink salmon escapement now therefore

IT IS HEREBY ORDERED AND ADJUDGED that the State of Washington be and it is hereby enjoined from prohibiting the fishing by Swinomish Indian Tribal Community fishermen for chinook salmon in the area know and designated as West Beach defined as that area lying easterly of a line from Deception Island to Lawson Reef to Partridge Point and easterly of Whidbey Island provided that such fishing shall be done by the use of nets with a minimum eight and one-quarter inch stretch mesh, using a ten pound weight on a wet net, unless said fishing results in a more than incidental catch of sockeye or pink salmon, or closure is necessary for conservation of the chinook salmon, and it is further

ORDERED that Mr. Ronald Costello, fish biologist for the Swinomish Indian Tribal Community constantly monitor the fishery and if the catch of sockeye or pink salmon exceed 5% of the catch to require closure of the fishery or report to the Court and it is further ORDERED that the permanent injunction application be heard at 9:30 a.m., October 20, 1975, and it is further

ORDERED that bond is set in the sum of $250.00.

ORDERED this 8th day of August, 1975.

/s/_____
George H. Boldt
Senior United States District Judge

UNITED STATES CONSTITUTION

ARTICLE II

§ 2 POWERS OF THE PRESIDENT. The president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have the power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think proper in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

ARTICLE VI

Debts, supremacy, oath. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

AMENDMENT V

RIGHTS OF ACCUSED IN CRIMINAL PROCEEDINGS. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or

public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT X

POWERS RESERVED TO STATES OR PEOPLE. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

AMENDMENT XIV

§ 1 CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TREATIES

TREATY OF MEDICINE CREEK

December 26, 1854
10 Stat. 1132

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

TREATY OF POINT ELLIOTT

January 22, 1855
12 Stat. 927

ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the Territory and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* that they shall not take shell-fish from any beds staked or cultivated by citizens.

TREATY OF POINT NO POINT

January 26, 1855
12 Stat. 933

ARTICLE 4. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

TREATY WITH THE MAKAH (TREATY OF NEAH BAY)

January 31, 1855
12 Stat. 939

ARTICLE IV. The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands: *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

TREATY WITH THE YAKIMAS

June 9, 1855
12 Stat. 951

ARTICLE III. *And provided,* That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

TREATY WITH THE QUINAIELTS

July 1, 1855
12 Stat. 971

ARTICLE III. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the

Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves.

Convention for the Protection, Preservation, and Extension of the Sockeye Salmon Fishery of the Fraser River System, May 26, 1930

Signed at Washington May 26, 1930; Ratification advised by the Senate subject to understandings June 16, 1936; Ratified by the President, subject to the said understandings, July 23, 1937; Ratified by His Majesty in respect of Canada June 26, 1937; Ratifications exchanged at Washington July 28, 1937; Proclaimed by the President August 4, 1937.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS a Convention between the United States of America and Canada for the protection, preservation and extension of the sockeye salmon fishery of the Fraser River system was concluded and signed by their respective Plenipotentiaries at Washington, on the twenty-sixth day of May, one thousand nine hundred and thirty, the original of which Convention is word for word as follows:

The President of the United States of America and His Majesty the King of Great Britain, Ireland and the British dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada, recognizing that the protection, preservation and

extension of the sockeye salmon fisheries in the Fraser River system are of common concern to the United States of America and the Dominion of Canada; that the supply of this fish in recent years has been greatly depleted and that it is of importance in the mutual interest of both countries that this source of wealth should be restored and maintained, have resolved to conclude a Convention and to that end have named as thier respective plenipotentiaries;

The President of the United States of America: Mr. Henry L. Stimson, Secretary of State of the United States of America; and

His Majesty, for the Dominion of Canada: The Honorable Vincent Massey, a member of His Majesty's Privy Council for Canada and His Envoy Extraordinary and Minister Plenipotentiary for Canada at Washington;

Who, after having communicated to each other their full powers, found in good and due form, have agreed upon the following Articles:

Article I

The provisions of this Convention and the orders and regulations issued under the authority thereof shall apply, in the manner and to the extent hereinafter provided in this Convention, to the following waters:

1. The territorial waters and the high seas westward from the western coast of the United States

of America and the Dominion of Canada and from a direct line drawn from Bonilla Point, Vancouver Island, to the lighthouse on Tatoosh Island, Washington, — which line marks the entrance to Juan de Fuca Strait, — and embraced between 48 and 49 degrees north latitude, excepting therefrom, however, all the waters of Barklay Sound, eastward of a straight line drawn from Amphitrite Point to Cape Beale and all the waters of Nitinat Lake and the entrance thereto.

2. The waters included within the following boundaries:

Beginning at Bonilla Point, Vancouver Island, thence along the aforesaid direct line drawn from Bonilla Point to Tatoosh Lighthouse, Washington, described in paragraph numbered 1 of this Article, thence to the nearest point of Cape Flattery, thence following the southerly shore of Juan de Fuca Strait to Point Wilson, on Quimper Peninsula, thence in a straight line to Point Partridge on Whidbey Island, thence following the western shore of the said Whidbey Island, to the entrance to Deception Pass, thence across said entrance to the southern side of Reservation Bay, on Fidalgo Island, thence following the western and northern shore line of the said Fidalgo Island to Swinomish Slough, crossing the said Swinomish Slough, in line with the track of the Great Northern Railway, thence northerly following the shore line of the mainland to Atkinson Point at the northerly entrance to Burrard Inlet, British

Columbia, thence in a straight line to the southern end of Bowen Island, thence westerly following the southern shore of Bowen Island to Cape Roger Curtis, thence in a straight line to Gower Point, thence westerly following the shore line to Welcome Point on Seechelt Peninsula, thence in a straight line to Point Young on Lasqueti Island, thence in a straight line to Dorcas Point on Vancouver Island, thence following the eastern and southern shores of the said Vancouver Island to the starting point at Bonilla Point, as shown on the United States Coast and Geodetic Survey Chart Number 6300, as corrected to March 14, 1930, and on the British Admiralty Chart Number 579, copies of which are annexed to this Convention and made a part thereof.

3. The Fraser River and the streams and lakes tributary thereto.

The High Contracting Parties engage to have prepared as soon as practicable charts of the waters described in this Article, with the above described boundaries thereof and the international boundary indicated thereon. Such charts, when approved by the appropriate authorities of the Governments of the United States of America and the Dominion of Canada, shall be considered to have been substituted for the charts annexed to this Convention and shall be authentic for the purposes of the Convention.

The High Contracting Parties further agree to establish within the territory of the United States of

America and the territory of the Dominion of Canada such buoys and marks for the purposes of this Convention as may be recommended by the Commission hereinafter authorized to be established, and to refer such recommendations as the Commission may make as relate to the establishment of buoys or marks at points on the international boundary to the International Boundary Commission, United States-Alaska and Canada, for action pursuant to the provisions of the Treaty between the United States of America and His Majesty, in respect of Canada, respecting the boundary between the United States of America and the Dominion of Canada, signed February 24, 1925.

Article II

The High Contracting Parties agree to establish and maintain a Commission to be known as the International Pacific Salmon Fisheries Commission, hereinafter called the Commission, consisting of six members, three on the part of the United States of America and three on the part of the Dominion of Canada.

The Commissioners on the part of the United States of America shall be appointed by the President of the United States of America. The Commissioners on the part of the Dominion of Canada shall be appointed by His Majesty on the recommendation of the Governor General in Council.

The Commissioners appointed by each of the High Contracting Parties shall hold office during the pleasure of the High Contracting Party by which they were appointed.

The Commission shall continue in existence so long as this Convention shall continue in force, and each High Contracting Party shall have power to fill and shall fill from time to time vacancies which may occur in its representation on the Commission in the same manner as the original appointments are made. Each High Contracting Party shall pay the salaries and expenses of its own Commissioners, and joint expenses incurred by the Commission shall be paid by the two High Contracting Parties in equal moieties.

Article III

The Commission shall make a thorough investigation into the natural history of the Fraser River sockeye salmon, into hatchery methods, spawning ground conditions and other related matters. It shall conduct the sockeye salmon fish cultural operations in the waters described in paragraphs numbered 2 and 3 of Article I of this Convention, and to that end it shall have power to improve spawning grounds, construct, and maintain hatcheries, rearing ponds and other such facilities as it may determine to be necessary for the propagation of sockeye salmon in any of the waters covered by this Convention, and to stock any such waters with

sockeye salmon by such methods as it may determine to be most advisable. The Commission shall also have authority to recommend to the Governments of the High Contracting Parties removing or otherwise overcoming obstructions to the ascent of sockeye salmon, that may now exist or may from time to time occur, in any of the waters covered by this Convention, where investigation may show such removal of or other action to overcome obstruction to be desirable. The Commission shall make an annual report to the two Governments as to the investigations which it has made and other action which it has taken in execution of the provisions of this Article, or of other Articles of this Convention.

The cost of all work done pursuant to the provisions of this Article, or of other Articles of this Convention, including removing or otherwise overcoming obstructions that may be approved, shall be borne equally by the two Governments, and the said Governments agree to appropriate annually such money as each may deem desirable for such work in the light of the reports of the Commission.

Article IV

The Commission is hereby empowered to limit or prohibit taking sockeye salmon in respect of all or any of the waters described in Article I of this Convention, provided that when any order is adopted by the Commission limiting or prohibiting taking

sockeye salmon in any of the territorial waters or on the High Seas described in paragraph numbered 1 of Article I, such order shall extend to all such territorial waters and High Seas, and, similarly, when in any of the waters of the United States of America embraced in paragraph numbered 2 of Article I, such order shall extend to all such waters of the United States of America, and when in any of the Canadian waters embraced in paragraphs numbered 2 and 3 of Article I, such order shall extend to all such Canadian waters, and provided further, that no order limiting or prohibiting taking sockeye salmon adopted by the Commission shall be construed to suspend or otherwise affect the requirements of the laws of the State of Washington or of the Dominion of Canada as to the procuring of a license to fish in the waters on their respective sides of the boundary, or in their respective territorial waters embraced in paragraph numbered 1 of Article I of this Convention, and provided further that any order adopted by the Commission limiting or prohibiting taking sockeye salmon on the High Seas embraced in a paragraph numbered 1 of Article I of this Convention shall apply only to nationals and inhabitants and vessels and boats of the United States of America and the Dominion of Canada.

Any order adopted by the Commission limiting or prohibiting taking sockeye salmon in the waters covered by this Convention, or any part thereof, shall remain in full force and effect unless and until the

same be modified or set aside by the Commission. Taking sockeye salmon in said waters in violation of an order of the Commission shall be prohibited.

Article V

In order to secure a proper escapement of sockeye salmon during the spring or chinook salmon fishing season, the Commission may prescribe the size of the meshes in all fishing gear and appliances that may be operated during said season in the waters of the United States of America and/or the Canadian waters described in Article I of this Convention. At all seasons of the year the Commission may prescribe the size of the meshes in all salmon fishing gear and appliances that may be operated on the High Seas embraced in paragraph numbered 1 of Article I of this Convention, provided, however, that in so far as concerns the High Seas, requirements prescribed by the Commission under the authority of this paragraph shall apply only to nationals and inhabitants and vessels and boats of the United States of America and the Dominion of Canada.

Whenever, at any other time than the spring or chinook salmon fishing season, the taking of sockeye salmon in waters of the United States of America or in Canadian waters is not prohibited under an order adopted by the Commission, any fishing gear or appliance authorized by the State of Washington may be used in waters of the United States of

America by any person thereunto authorized by the State of Washington, and any fishing gear or appliance authorized by the laws of the Dominion of Canada may be used in Canadian waters by any person thereunto duly authorized. Whenever the taking of sockeye salmon on the High Seas embraced in paragraph numbered 1 of Article I of this Convention is not prohibited, under an order adopted by the Commission, to the nationals or inhabitants or vessels or boats of the United States of America or the Dominion of Canada, only such salmon fishing gear and appliances as may have been approved by the Commission may be used on such High Seas by said nationals, inhabitants, vessels or boats.

ARTICLE VI

No action taken by the Commission under the authority of this Convention shall be effective unless it is affirmatively voted for by at least two of the Commissioners of each High Contracting Party.

ARTICLE VII

Inasmuch as the purpose of this Convention is to establish for the High Contracting Parties by their joint effort and expense, a fishery that is now largely nonexistent, it is agreed by the High Contracting Parties that they should share equally in the fishery. The Commission shall, consequently, regulate the

fishery with a view to allowing, as nearly as may be practicable, an equal portion of the fish that may be caught each year to be taken by the fishermen of each High Contracting Party.

ARTICLE VIII

Each High Contracting Party shall be responsible for the enforcement of the orders and regulations adopted by the Commission under the authority of this Convention, in the portion of its waters covered by the Convention.

Except as hereinafter provided in Article IX of this Convention, each High Contracting Party shall be responsible, in respect of its own nationals and inhabitants and vessels and boats, for the enforcement of the orders and regulations adopted by the Commission, under the authority of this Convention, on the High Seas embraced in paragraph numbered 1 of Article I of the Convention.

Each High Contracting Party shall acquire and place at the disposition of the Commission any land within its territory required for the construction and maintenance of hatcheries, rearing ponds, and other such facilities as set forth in Article III.

ARTICLE IX

Every national or inhabitant, vessel or boat of the United States of America or of the Dominion of Canada, that engages in sockeye salmon fishing on

the High Seas embraced in paragraph numbered 1 of Article I of this Convention, in violation of an order or regulation adopted by the Commission, under the authority of this Convention, may be seized and detained by the duly authorized officers of either High Contracting Party, and when so seized and detained shall be delivered by the said officers, as soon as practicable, to an authorized official of the country to which such person, vessel or boat belongs, at the nearest point to the place of seizure, or elsewhere, as may be agreed upon with the competent authorities. The authorities of the country to which a person, vessel or boat belongs alone shall have jurisdiction to conduct prosecutions for the violation of any order or regulation, adopted by the Commission in respect of fishing for sockeye salmon on the High Seas embraced in paragraph numbered 1 of Article I of this Convention, or of any law or regulation which either High Contracting Party may have made to carry such order or regulation of the Commission into effect, and to impose penalties for such violations; and the witnesses and proofs necessary for such prosecutions, so far as such witnesses or proofs are under the control of the other High Contracting Party shall be furnished with all reasonable promptitude to the authorities having jurisdiction to conduct the prosecutions.

ARTICLE X

The High Contracting Parties agree to enact and

enforce such legislation as may be necessary to make effective the provisions of this Convention and the orders and regulations adopted by the Commission under the authority thereof, with appropriate penalties for violations.

ARTICLE XI

The present Convention shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Majesty in accordance with constitutional practice, and it shall become effective upon the date of the exchange of ratifications which shall take place at Washington as soon as possible and shall continue in force for a period of sixteen years, and thereafter until one year from the day on which either of the High Contracting Parties shall give notice to the other of its desire to terminate it.

In witness whereof, the respective plenipotentiaries have signed the present Convention, and have affixed their seals thereto.

Done in duplicate at Washington on the twenty-sixth day of May, one thousand nine hundred and thirty.

[SEAL] HENRY L. STIMSON

[SEAL] VINCENT MASSEY

AND WHEREAS the said Convention has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the city of

Washington on the twenty-eighth day of July, one thousand nine hundred and thirty-seven;

AND WHEREAS the said Convention was ratified by the United States of America subject to three understandings, made a part of the ratification, as follows:

(1) That the International Pacific Salmon Fisheries Commission shall have no power to authorize any type of fishing gear contrary to the laws of the State of Washington or the Dominion of Canada;

(2) That the Commission shall not promulgate or enforce regulations until the scientific investigations provided for in the convention have been made, covering two cycles of Sockeye Salmon runs, or eight years; and

(3) That the Commission shall set up an Advisory Committee composed of five persons from each country who shall be representatives of the various branches of the industry (purse seine, gill net, troll, sport fishing, and one other), which Advisory Committee shall be invited to all non-executive meetings of the Commission and shall be given full opportunity to examine and to be heard on all proposed orders, regulations or recommendations.

AND WHEREAS the aforesaid three understandings have been accepted by the Government of Canada, as is recorded in the Protocol of Exchange of ratifications of the said Convention;

NOW, THEREFORE, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof, subject to the three understandings herein recited.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this fourth day of August in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the United
[SEAL] States of America the one hundred and sixty-second.

FRANKLIN D. ROOSEVELT

By the President:

CORDELL HULL

Secretary of State.

PROTOCOL OF EXCHANGE

The undersigned the Secretary of State of the United States of America and the Canadian Minister at Washington met this day for the purpose of exchanging ratifications of the convention between the United States of America and Canada for the protection, preservation and extension of the sockeye salmon fisheries of the Fraser River System, signed at Washington on May 26, 1930.

The Secretary of State of the United States of America stated that the convention is ratified on the part of the United States of America subject to the three understandings contained in the resolution of the Senate of the United States of America advising and consenting to ratification, a copy of which resolution was communicated to the Secretary of State for External Affairs of Canada by the Minister of the United States of America at Ottawa in his note of July 7, 1936. These three understandings are as follows:

(1) That the International Pacific Salmon Fisheries Commission shall have no power to authorize any type of fishing gear contrary to the laws of the State of Washington or the Dominion of Canada;

(2) That the Commission shall not promulgate or enforce regulations until the scientific investigations provided for in the convention that have been made, covering two cycles of Sockeye Salmon runs, or eight years;

and

(3) That the Commission shall set up an Advisory Committee composed of five persons from each country who shall be representatives of the various branches of the industry (purse seine, gill net, troll, sport fishing, and one other), which Advisory Committee shall be invited to all non-executive meetings of the Commission and shall be given full opportunity to examine and to be heard on all proposed orders, regulations or recommendations.

The Canadian Minister stated that he was authorized by his Government to state that it accepted the foregoing understandings.

The exchange then took place in the usual manner.

IN WITNESS WHEREOF they have signed the present protocol and have affixed their seals hereto.

Done at Washington this twenty-eighth day of July, 1937.

[SEAL] CORDELL HULL,
Secretary of State of the United States of America

[SEAL] HERBERT M. MARLER,
Canadian Minister.

PROTOCOL AMENDING THE CONVENTION, TO INCLUDE PINK SALMON IN THE FRASER RIVER SYSTEM, DECEMBER 28, 1956

Signed at Ottawa December 28, 1956; Ratification advised by the Senate June 6, 1957; Ratified by the President June 18, 1957; Ratified by Canada April 19, 1957; Ratifications exchanged at Ottawa July 3, 1957; Proclaimed by the President July 24, 1957; Entered into force July 3, 1957.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS a protocol between the Government of the United States of America and the Government of Canada to the Convention for the Protection, Preservation, and Extension of the Sockeye Salmon Fisheries in the Fraser River System signed at Washington on the 26th day of May 1930 was signed at Ottawa on December 28, 1956, the original of which protocol is word for word as follows:

PROTOCOL BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF CANADA TO THE CONVENTION FOR THE PROTECTION, PRESERVATION, AND EXTENSION OF THE SOCKEYE

SALMON FISHERIES IN THE FRASER RIVER SYSTEM, SIGNED AT WASHINGTON ON THE 26TH DAY OF MAY, 1930.

The Government of the United States of America and the Government of Canada, desiring to coordinate the programs for the conservation of the sockeye and pink salmon stocks of common concern by amendment of the Convention between the United States of America and Canada for the Protection, Preservation and Extension of the Sockeye Salmon Fisheries in the Fraser River System, signed at Washington on the 26th day of May, 1930, hereinafter referred to as the Convention,

Have agreed as follows:

ARTICLE I

The Convention as amended by the present Protocol shall apply to pink salmon with the following exception:

The understanding stipulated in the Protocol of Exchange of Ratification signed at Washington on the 28th day of July, 1937, which provides that "the Commission shall not promulgate or enforce regulations until the scientific investigations provided for in the Convention have been made, covering two cycles of sockeye salmon runs, or eight years;" shall not apply to pink salmon.

ARTICLE II

The following words shall be deleted from the first sentence of Article IV of the Convention:

"* * * that when any order is adopted by the Commission limiting or prohibiting taking sockeye salmon in any of the territorial waters or on the High Seas described in paragraph numbered 1 of Article I, such order shall extend to all such territorial waters and High Seas, and, similarly, when in any of the waters of the United States of America embraced in paragraph numbered 2 of Article I, such order shall extend to all such waters of the United States of America, and and when in any of the Canadian waters embraced in paragraphs numbered 2 and 3 of Article I, such order shall extend to all such Canadian waters, and provided further * * *"

ARTICLE III

The following paragraph shall be added to Article VI of the Convention:

"All regulations made by the Commission shall be subject to approval of the two Governments with the exception of orders for the adjustment of closing or opening of fishing periods and areas in any fishing season and of emergency orders required to carry out the provisions of the Convention."

ARTICLE IV

Article VII of the Convention shall be replaced by the following Article:

"The Commission shall regulate the fisheries for sockeye and for pink salmon with a view to allowing, as nearly as practicable, an equal

portion of such sockeye salmon as may be caught each year and an equal portion of such pink salmon as may be caught each year to be taken by the fisherman of each Party."

ARTICLE V

Paragraph (3) of the understandings stipulated in the Protocol of Exchange of Ratifications signed at Washington on the 28th day of July 1937, shall be amended to read as follows:

"That the Commission shall set up an Advisory Committee composed of six persons from each country who shall be representatives of the various branches of the industry including, but not limited to, purse seine, gill net, troll, sport fishing and processing, which Advisory Committee shall be invited to all non-executive meetings of the Commission and shall be given full opportunity to examine and to be heard on all proposed orders, regulations or recommendations."

ARTICLE VI

1. The Parties shall conduct a coordinated investigation of pink salmon stocks which enter the waters described in Article I of the Convention for the purpose of determining the migratory movements of such stocks. That part of the investigation to be carried out in the waters described in Article I of the Convention shall be carried out by the Commission.

2. Except with regard to that part of the investigation to be carried out by the Commission, the provisions of Article III of the Convention with

respect to the sharing of cost shall not apply to the investigation referred to in this Article.

3. The Parties shall meet in the seventh year after the entry into force of this Protocol to examine the results of the investigation referred to in this Article and to determine what further arrangements for the conservation of pink salmon stocks of common concern may be desirable.

ARTICLE VII

Nothing in the Convention or this Protocol shall preclude the Commission from recording such information on stocks of salmon other than sockeye or pink salmon as it may acquire incidental to its activities with respect to sockeye and pink salmon.

ARTICLE VIII

The present Protocol shall be ratified and the exchange of the instruments of ratification shall take place in Ottawa as soon as possible. It shall come into force on the day of the exchange of the instruments of ratification.

IN WITNESS WHEREOF the undersigned, duly authorized by their respective Governments, have signed this Protocol and have affixed thereto their seals.

Done in duplicate at Ottawa this 28th day of December, 1956.

For the Government of the United States of America:

LIVINGSTON T. MERCHANT

[SEAL] WM. C. HERRINGTON

For the Government of Canada:

[SEAL] JAMES SINCLAIR

WHEREAS the Senate of the United States of America by their resolution of June 6, 1957, two-thirds of the Senators present concurring therein, did advise and consent to the ratification of the said protocol;

WHEREAS the said protocol was duly ratified by the President of the United States of America on June 18, 1957, in pursuance of the aforesaid advice and consent of the Senate, and was duly ratified on the part of Canada;

WHEREAS the respective instruments of ratification of the said protocol were duly exchanged at Ottawa on July 3, 1957;

AND WHEREAS it is provided in Article VIII of the said protocol that the protocol shall come into force on the day of the exchange of the instruments of ratification;

NOW, THEREFORE, be it known that I, DWIGHT D. EISENHOWER, President of the United States of America, do hereby proclaim and make public the said protocol to the end that the same and each and every article and clause thereof may be observed and fulfilled with good faith, on and after July 3, 1957, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twenty-fourth day of July in the year of our Lord one thousand nine hundred fifty-seven and of the Independence of
[SEAL] the United States of America the one hundred eighty-second.

DWIGHT D. EISENHOWER

By the President:

CHRISTIAN A. HERTER

Acting Secretary of State

16 USC § 776. Definitions

When used in this chapter—

(a) Convention: The word "convention" means the convention between the United States of America and the Dominion of Canada for the protection, preservation, and extension of the sockeye salmon fisheries of the Fraser River system, signed at Washington on the 26th day of May 1930, as amended by the protocol to the convention, signed at Ottawa on the 28th day of December 1956.

(b) Commission: The word "Commission" means the International Pacific Salmon Fisheries Commission provided for by article II of the convention.

(c) Person: The word "person" includes individuals, partnerships, associations, and corporations.

(d) Convention waters: The term "convention waters" means those waters described in article I of the convention.

(e) Sockeye salmon and pink salmon: The term "sockeye salmon" means that species of salmon known by the sicentific name Oncorhynchus nerka, and the term "pink salmon" means that species of salmon known by the scientific name Oncorhynchus gorbuscha.

(f) Vessel: The word "vessel" includes every type or description of water craft or other contrivance used, or capable of being used, as a means of transportation in water.

(g) Fishing: The word "fishing" means the fishing for, catching, or taking, or the attempted fishing for, catching, or taking, of any sockeye salmon or pink salmon in convention waters.

(h) Fishing gear: The term "fishing gear" means any net, trap, hook, or other device, appurtenance or equipment, of whatever kind or description, used or capable of being used, for the purpose of capturing fish or as an aid in capturing fish.

16 USC § 776a. Unlawful acts

(a) It shall be unlawful for any person to engage in fishing for sockeye salmon or pink salmon in convention waters in violation of the convention or of this chapter or of any regulation of the Commission.

(b) It shall be unlawful for any person to ship, transport, purchase, sell, offer for sale, import, export, or have in possession any sockeye salmon or pink salmon taken in violation of the convention or of this chapter or of any regulation of the Commission.

(c) It shall be unlawful for any person or vessel to use any port or harbor or other place subject to the jurisdiction of the United States for any purpose connected in any way with fishing in violation of the convention or of this chapter or of any regulation made by the Commission.

(d) It shall be unlawful for any person or vessel to engage in fishing for sockeye salmon or pink

salmon in convention waters without first having obtained such license or licenses as may be used by or required by the Commission, or to fail to produce such license, upon demand, for inspection by an authorized enforcement officer.

(e) It shall be unlawful for any person to fail to make, keep, submit, or furnish any record or report required of him by the Commission or to refuse to permit any officer authorized to enforce the convention, this chapter, and the regulations of the Commission, or any authorized representative of the Commission, to inspect any such record or report at any reasonable time.

(f) It shall be unlawful for any person to molest, interfere with, tamper with, damage, or destroy any boat, net, equipment, stores, provisions, fish-cultural stations, rearing pond, weir, fishway, or any other structure, installation, experiment, property, or facility acquired, constructed, or maintained by the Commission.

(g) It shall be unlawful for any person or vessel to do any act prohibited or to fail to do any act required by the convention or by this chapter or by any regulation of the Commission.

FISHERY CONSERVATION AND MANAGEMENT

16 USC § 1801. Findings, purposes and policy

(a) Findings.—The Congress finds and declares the following:

(1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.

(2) As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at

an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

(6) A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources.

(7) A national program for the development of fisheries which are underutilized or not utilized by United States fishermen, including bottom fish off Alaska, is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby.

(b) Purposes.—It is therefore declared to be the purposes of the Congress in this chapter—

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by establishing (A) a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish, except highly migratory species, and (B) exclusive fishery management authority beyond such zone over such anadromous species and Continental Shelf fishery resources;

(2) to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary;

(3) to promote domestic commercial and recreational fishing under sound conservation and management principles;

(4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;

(5) to establish Regional Fishery Management Councils to prepare, monitor, and revise such plans under circumstances (A) which will enable the States,

the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States; and

(6) to encourage the development of fisheries which are currently underutilized or not utilized by United States fishermen, including bottom fish off Alaska.

(c) Policy.—It is further declared to be the policy of the Congress in this chapter—

(1) to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources, as provided for in this chapter;

(2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this chapter;

(3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of interested and affected States and citizens; promotes efficiency; draws upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement; and is workable and effective;

(4) to permit foreign fishing consistent with the provisions of this chapter; and

(5) to support and encourage continued active United States efforts to obtain an internationally acceptable treaty, at the Third United Nations Conference on the Law of the Sea, which provides for effective conservation and management of fishery resources.

16 USC § 1811. Fishery conservation zone

There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

16 USC § 1812. Exclusive fishery management authority

The United States shall exercise exclusive fishery management authority, in the manner provided for in this chapter, over the following:

(1) All fish within the fishery conservation zone.

(2) All anadromous species throughout the migratory range of each such species beyond the fishery conservation zone; except that such management authority shall not extend to such species during the time they are found within any foreign nation's territorial sea or fishery

conservation zone (or the equivalent), to the wxtent that such sea or zone is recognized by the United States.

(3) All Continental Shelf fishery resources beyond the fishery conservation zone.

RCW 75.40.060 Fraser River sockeye salmon fishery——Adoption, enforcement of convention authorized. The director and his duly authorized agents are hereby authorized to adopt and to enforce the provisions of the convention between the United States and the Dominion of Canada for the protection, perservation and extension of the sockeye salmon fishery of the Fraser River system, signed at Washington, District of Columbia, on the twenty-sixth day of May, 1930, and the regulations of the commission promulgated under authority of said convention.

DEPARTMENT OF STATE

Washington, D.C. 20520

BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS

March 16, 1977

The Honorable Donald Moos
Commissioner
International Pacific Salmon
Fisheries Commission
National Marine Fisheries Service
Room 115
General Administration Building
Olympia, Washington 98501

Dear Don:

As you know, the U.S. authorities presented to the Canadian authorities some proposed modifications to the IPSFC's tentative regulatory recommendations for U.S. Convention waters for 1977 with the aim of accommodating the *U.S. v. Washington* decision regarding Indian treaty rights. After a meeting of officials of the two governments in Vancouver, B.C. on March 2-3, 1977, when the Commission's staff advised that these measure would not adversely affect escapement and an equal division of catch in Convention waters, the Canadian

authorities informed us they are prepared to accept our proposals with a few drafting changes.

I am enclosing a final copy of the proposal, which incorporates the Canadian modifications, as well as the reef net changes discussed at the Vancouver meeting. You are instructed to support it at the next Commission meeting and vote for its adoption into final regulations for 1977.

Sincerely,

/s/_____
Rozanne L. Ridgway
Deputy Assistant Secretary
For Oceans and Fisheries
Affairs

Enclosure:
As stated

Supreme Court, U. S.
FILED
OCT 6 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978
No. 78-119

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES and DONALD W. MOOS, Its Director,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents,

MAKAH TRIBE, LOWER ELWHA BAND OF CLALLAM TRIBE, PORT GAMBLE BAND OF CLALLAM TRIBE, SUQUAMISH TRIBE, LUMMI TRIBE, NOOKSACK TRIBE, and SWINOMISH INDIAN TRIBAL COMMUNITY,

Intervenors-Respondents.

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SLADE GORTON,
Attorney General,
EDWARD B. MACKIE,
Deputy Attorney General,
JAMES M. JOHNSON,
Sr. Asst. Attorney General,
Counsel for Petitioners.
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STATE PRINTING PLANT OLYMPIA, WASHINGTON

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978
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Respondents.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, Washington State, Washington State Department of Fisheries and the director of that department in our Petition for Certiorari have requested this court to review the Ninth Circuit Court of Appeals decision in *U.S. v. Washington*, No. 75-2835,

76-1042 (referred to as "International Fishery Case" —Pet. App. A-29-33). While the Solicitor General on behalf of the United States has generally supported or acquiesced in the state's request for certiorari, he has however with reference to the "International Fishery Case" supported the position of the Ninth Circuit that the case is moot.

The State's Petition, pp. 28-35, demonstrates that those court orders are not moot as reflected by the regulations adopted by the Department of Interior in 25 C.F.S. 256(B) Federal Register Vol. 43 No. 122., Friday, June 23, 1978. The continuing effect of these decisions by the court with reference to the "International Fishery" are reflected by two letters from the International Pacific Salmon Fisheries Commission which we received after the filing of the State's Petition for Certiorari. Those letters addressed to the Acting Assistant Secretary of the United States Department and the Canadian Minister of Fisheries clearly express the continuing effect of the decrees for which review has been sought. (See, Appendix B-1 and 2 for the text of those letters).

We respectfully submit that the Petition for Certiorari including the International Fishery Case should be granted by this court.

Dated this 3rd day of October, 1978.

SLADE GORTON
Attorney General

EDWARD B. MACKIE
Deputy Attorney General
Attorneys for Petitioner

APPENDIX B-1

July 21, 1978

Mr. John D. Negroponte
Acting Assistant Secretary
Department of State
Bureau of Oceans and International
Environmental and Scientific Affairs
Washington, D.C. 20520

Dear Mr. Negroponte:

We wish to acknowldege your letter of June 5, 1978 concerning approval of the Commission's regulations for 1978 except as to the United States Indians exercising treaty fishing rights.

The Sockeye Salmon Convention, as ratified by His Majesty for Canada and by the President for the United States, does not provide for either High Contracting Party making exceptions for certain fishermen from the Commission's regulations, nor does it provide for separate "domestic" regulations or separate Indian Tribal regulations in Convention Waters. The Commission therefore objects to the actions of the United States authorities providing multiple regulatory authority in United States Convention Waters.

The basic objectives of the Convention cannot and will not be achieved when there are several regulatory agencies with only this Commission responsible for carrying out the provisions of the Convention. Since this practice has started in the United States

there have been examples of detrimental effects on the management of the salmon stocks concerned, and there seems little likelihood of anything but negative effects in the future. This is a deplorable situation which will be detrimental to the intrests of all fishermen who fish for Fraser River sockeye and pink salmon in both countries.

Yours very truly,

INTERNATIONAL PACIFIC
SALMON FISHERIES
COMMISSION

W. R. Hourston
Chairman

APPENDIX B-2

July 21, 1978

The Honorable Romeo LeBlanc, P.C.M.P.
Minister of Fisheries and the Environment
House of Commons
Ottawa, Canada K1A OH3

Dear Mr. LeBlanc:

Enclosed for your information is a copy of letter sent to Mr. Negroponte of the United States Department of State concerning this Commission's regulations for 1978.

The Commission is very much concerned with the United States Government action in excepting Indians from the Commission regulations and in setting "domestic" regulations for Indians, and the actions of the Federal Court in approving separate Indian Tribal regulations as well, all of which are not in accordance with the provisions of the Sockeye Salmon Convention. The objectives of the Convention are being jeopardized by the multiplicity of regulatory agencies, of which only this Commissions is responsible for carrying out the provisions of the Convention. It is difficult to understand how either High Contracting Party to the Convention can allow these actions, which are contrary to the provisions of the Convention as approved by His Majesty and the President. The ability of the Commission to fulfill its responsibilities under the Convention is being impaired, and the Commission urges that the Canadian Govern-

ment make the strongest possible objection to the United States Government.

Yours very truly,

INTERNATIONAL PACIFIC
SALMON FISHERIES
COMMISSION

W. R. Hourston
Chairman

Supreme Court, U. S.
FILED
SEP 19 1978
MICHAEL RODAK, JR., CLERK

Nos. 78-119 and 78-139

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF WASHINGTON, ET AL., PETITIONERS
v.
UNITED STATES OF AMERICA, ET AL.

PUGET SOUND GILLNETTERS ASSOCIATION, ET AL., PETITIONERS
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,

JAMES W. MOORMAN,
Assistant Attorney General,

STEPHEN R. BARNETT,
Deputy Solicitor General,

LOUIS F. CLAIBORNE,
Assistant to the Solicitor General,

KATHRYN A. OBERLY,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-119

STATE OF WASHINGTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

Two petitions for a writ of certiorari have been filed seeking review of three separate decisions entered in the same controversy. The State of Washington (Pet. No. 78-119) seeks review of the decision of the court of appeals in the consolidated cases of *Puget Sound Gillnetters Association* v. *United States District Court for the Western District of Washington* and *United States* v. *Washington* (hereafter the "Washington Fishery case"),

and also seeks review of the separate decision of the court of appeals in *United States* v. *Washington* (hereafter the "International Fishery case"). The Puget Sound Gillnetters Association and the Purse Seine Vessel Owners Association (Pet. No. 78-139) seek review of the decision of the court of appeals in the Washington Fishery case, *supra,* and also seek review, pursuant to Rule 20 of the Rules of this Court, of the decision entered by the district court on June 6, 1978, in *United States* v. *Washington,* Civ. No. 9213 (W.D. Wash.) (hereafter the "1978 Enforcement Order").

The United States submits this single response to both petitions.

OPINIONS BELOW

The opinion of the court of appeals in the Washington Fishery case (Pet. App. A-1 to A-28)[1] is reported at 573 F. 2d 1123. The opinion of the court of appeals in the International Fishery case (Pet. App. A-29 to A-33) is reported at 573 F. 2d 1118. The findings of fact, conclusions of law, and preliminary injunction of the district court issued upon entry of the 1978 Enforcement Order (Pet. No. 78-139, App. C-1 to C-13) are unreported.

JURISDICTION

The judgments of the court of appeals in the Washington Fishery case and the International Fishery case were entered on April 24, 1978. The 1978 Enforcement Order was entered by the district court on June 6, 1978, and a notice of appeal to the court of appeals was filed on July 19, 1978. The petition for a writ of certiorari

[1]Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 78-119.

in No. 78-119 was filed on July 21, 1978, and the petition in No. 78-139 was filed on July 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether treaties guarantee Indian tribes in the State of Washington an opportunity to harvest up to one-half of any run of fish that normally would pass through the tribes' usual and accustomed off-reservation fishing stations, with adjustments for tribal subsistence and ceremonial fishing (both petitions).

2. Whether, in light of the State of Washington's failure to adopt regulations permitting Indian fishermen to harvest their treaty share of fish, the district court properly exercised its discretion by allocating the salmon harvest equally between treaty and non-treaty fishermen (with adjustments for tribal subsistence and ceremonial fishing) and enjoining the State from interfering with the court's allocation (both petitions).

3. Whether, in light of the State of Washington's unwillingness or inability to prevent its non-treaty fishermen from encroaching on the fishing rights of treaty Indians, the district court properly enjoined state-licensed non-treaty fishermen from harvesting salmon in excess of their allocated share (both petitions).

4. Whether the State of Washington must manage and regulate its fisheries in such a manner as to ensure that federally-guaranteed treaty fishing rights are protected, notwithstanding the absence of any state statute specifically authorizing enforcement of Indian fishing rights (both petitions).

5. Whether this Court should grant certiorari before judgment in the court of appeals to review an order of the

district court which presents the same issues that are before this Court in the petition for review of the Washington Fishery case but which constitutes the enforcement order presently in effect (Pet. No. 78-139 only).

6. Whether the court of appeals correctly concluded that the matters at issue in the International Fishery Case are now moot (Pet. No. 78-119 only).

TREATIES INVOLVED

The treaties involved in this case are the Treaty of Medicine Creek (10 Stat. 1132), the Treaty of Point Elliott (12 Stat. 927), the Treaty of Point No Point (12 Stat. 933), the Treaty with the Makahs (12 Stat. 939), the Treaty with the Yakimas (12 Stat. 951), and the Treaty of Olympia (12 Stat. 971). With immaterial variations, these treaties each provide (10 Stat. 1132-1133):

> ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows * * *.
>
> ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, * * * all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; * * *.
>
> ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, * * *.

STATEMENT

1. *Background of the federal litigation.*

The present petitions reflect the continued unwillingness of the State of Washington and its non-treaty fishermen to accept the validity of the 1974 decision of the federal district court in *United States* v. *Washington,* 384 F. Supp. 312 (W.D. Wash.), affirmed, 520 F. 2d 676 (C.A. 9), certiorari denied, 423 U.S. 1086. That case was brought in 1970 by the United States, on its own behalf and as trustee for several Indian tribes, to compel the State of Washington to comply with treaties guaranteeing off-reservation fishing rights to the Indian tribes.[2] After extensive pretrial development of the evidence and an 18-day trial, the district court entered detailed findings of fact. 384 F. Supp. at 348-399. Among other things, the court found that the treaty tribes fished for trade, as well as subsistence and ceremonial purposes, at the time the treaties were made. *Id.* at 350-353. In negotiating the treaties, the tribes were willing to relinquish their claims to large areas of land and restrict their residence to reservations. But the tribes insisted, and the United States agreed, that they could continue to fish

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[2]In a series of cases that are roughly contemporaneous to this litigation, it has been held that the State may regulate the tribes' treaty fishing in the interest of conservation, *Puyallup Tribe* v. *Department of Game of Washington,* 391 U.S. 392, 398 ("*Puyallup I*"); that conservatory measures may not discriminate against tribal net fishing, *Department of Game of Washington* v. *Puyallup Tribe,* 414 U.S. 44, 48 ("*Puyallup II*"); that where unrestricted fishing would lead to destruction of the species, the number of fish that may be caught "must in some manner be fairly apportioned between Indian net fishing and non-Indian * * * fishing," *ibid.;* and that an allocation to the Indians of 45 percent of the natural run of fish entering the river was appropriate. *Puyallup Tribe* v. *Department of Game of Washington,* 433 U.S. 165, 177 and n. 18 ("*Puyallup III*").

at their usual and accustomed stations off the reservations, although they would have to share these fisheries with the citizens of the Territory. *Id.* at 355-357.

The court found that, as the number of non-Indian fishermen grew and the State adopted conservation measures, those measures favored non-Indian fishermen to the detriment of the treaty fishermen. The court found that "[e]nforcement of state fishing laws and regulations against treaty Indians fishing at their usual and accustomed fishing places has been in part responsible for prevention of the full exercise of Indian treaty fishing rights, loss of income to the Indians, inhibition of cultural practices, confiscation and damage to fishing equipment, and arrest and criminal prosecution of Indians." *Id.* at 388. The court found that tribal fishermen had avoided using some usual and accustomed fishing stations because of state enforcement actions, 384 F. Supp. at 358, and that the Washington Departments of Fisheries and Game had seized Indian boats and nets, and fish caught by Indians, without notice to their owners and without judicial proceedings, *id.* at 388. Finally, the court found that "[t]he regulations of the Department of Fisheries, as presently framed and enforced, in many instances allow all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the plaintiff tribes' usual and accustomed fishing places to which the treaties apply." *Id.* at 393.

The district court held that, under the several treaties at issue, each of the plaintiff tribes had reserved to itself and its members a right to fish at all usual and accustomed grounds and stations "in common with all citizens of the Territory." *Id.* at 406. The court determined that numerous state regulations discriminated against or

improperly limited Indian fishing and were thus "in violation of the treaty-secured rights of the plaintiff tribes and their members." *Id.* at 413. The court further determined that injunctive relief was necessary to protect the tribal treaty rights from a "continuation and repetition" of state interference. *Ibid.*

In its injunction, the court directed the State "to take all appropriate steps" within its authority to control non-Indian fishing at places other than the usual and accustomed fishing stations of the treaty tribes so that the tribes will receive "an equal sharing of the [fishing] opportunity * * *." *Id.* at 344.[3] In response to requests by both the United States and the State,[4] the court established a formula for determining the maximum extent

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[3]Substantial numbers of fish are caught by non-treaty fishermen in marine areas before they enter the rivers where accustomed Indian fishing stations are located. 384 F. Supp. at 344.

[4]The Washington Department of Game contended that the treaties afforded the Indians no rights not enjoyed by other citizens. The Washington Department of Fisheries, on the other hand, recognized that the treaties provided the tribes with special fishing rights at their usual and accustomed places and that the tribes were entitled to a "fair and equitable share" of the harvestable salmon returning to those waters (Fisheries Pre-Trial Br., p. 2; Final Pre-Trial Order, pp. 137-138). The Department of Fisheries requested the court "to quantify the treaty right by reference to an objective, definite standard" to be stated in terms of a "percentage, set by the court, of the harvestable salmon which originate in and return to waters of the State of Washington in the case area" (Fisheries Pre-Trial Br., pp. 8, 22; see also p. 2). In its post-trial brief (p. 36) and in argument in the district court (Tr. 4384), the Department proposed "one-third" of the runs originating in the rivers where Indians fish as a fair share for the tribes, with the remaining two-thirds to be divided between non-Indian sport and commercial fishermen.

The United States argued that non-Indian fishing should be regulated in such a manner as to permit the tribes the opportunity to catch 50 percent of the harvestable fish (Respondent's Post-Trial Br.,

of the tribes' entitlement. The formula provided basically that the tribes are entitled to the opportunity to fish for up to one-half of any run of fish that normally would pass through their usual and accustomed fishing stations, with various adjustments for fish caught beyond state jurisdiction and for subsistence and ceremonial fishing. Fish caught by the Indians within their reservation were not to be included in the tribes' one-half share of the run. *Id.* at 343-344.

The court of appeals affirmed the judgment and orders of the district court. 520 F. 2d 676. The court held that the fishing rights that the tribes had reserved when they entered into the treaties had been rendered "nugatory" by the State's pattern of regulation. *Id.* at 685. The court reviewed and approved the equitable relief granted by the district court and noted that (*id.* at 687):

> [t]he district court has a great amount of discretion as a court of equity in so devising the details of an apportionment as to best protect the interests of all parties, as well as those of the public.

The court of appeals remanded the case to the district court for it to exercise a continuing jurisdiction. *Id.* at 693. This Court denied the petition for a writ of certiorari filed by the State of Washington. 423 U.S. 1086.

2. *The parallel state litigation.*

Implementation of the district court's decree has proved difficult. The State of Washington has not discharged its responsibilities under the decision, and non-treaty fishermen have continued to fish throughout the area in

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pp. 81-84). The United States rejected the Department of Fisheries' proposed one-third/two-thirds allocation as having no connection with the intent or language of the treaties.

disregard of state regulations and the orders of the district court.[5] In each fishing season since the decision, the United States and the tribes have been forced to return to the district court seeking further orders to require compliance with the district court's initial decision. At the same time, non-Indian fishermen have instituted numerous suits against the State of Washington in the state courts, seeking declaratory and injunctive relief against implementation of state regulations that limit non-treaty fishing to protect treaty rights in compliance with the federal court's mandate. The state courts have consistently granted such relief, holding not only that the regulations are in violation of state law, but that the federal district court's interpretation of the Indians' treaty rights was erroneous and unconstitutional.

Two of these state cases are now pending on petition for a writ of certiorari in this Court (Pet. No. 77-983).[6] In *Puget Sound Gillnetters Association* v. *Moos*, 88 Wash. 2d 677, 565 P. 2d 1151, an individual and an association of commercial non-Indian fishermen filed an original action for mandamus in the state supreme court. They

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[5]The record in *United States* v. *Washington*, W.D. Wash., Civil No. 9213, is replete with evidence of illegal non-treaty fishing and the State's unsuccessful efforts to control it. See, *e.g.*, Docket Nos. 768, 964, 968, 970, 1148, 1177, 1381, 1494, 1555, 2436, 2511, 2618, 2636, 2787, 3405, 3406, 3420, 3439, and 3945 in *United States* v. *Washington*.

[6]In addition to the decisions of which review is sought in this Court, see also *Purse Seine Vessel Owners Association* v. *Moos*, 88 Wash. 2d 799, 567 P. 2d 205; *Grays Harbor Gillnetters Association* v. *Sandison*, Wash. Sup. Ct., No. 45144 (argued October 31, 1977); *Puget Sound Gillnetters Association* v. *Sandison*, Thurston County Super. Ct., No. 58107 (decided August 24, 1977); and *Columbia River Fishermen's Protective Union, Inc.* v. *Dixie Lee Ray*, Thurston County Super. Ct., No. 55339 (decided August 25, 1977).

requested the court to restrain the Washington Department of Fisheries from promulgating fishing regulations which, as required by the federal decision, would allocate the harvest between treaty and non-treaty fishermen. Neither the United States nor the treaty tribes were parties to the action, although they participated as *amici curiae*.

On June 9, 1977, the state supreme court issued an opinion accepting the non-Indians' arguments, though declining to issue the requested writ of mandamus.[7] The court held that, under state law, the Director of Fisheries lacked statutory authority to restrict fishing for any purpose other than conservation. 88 Wash. 2d at 681-683, 565 P. 2d at 1158-1164. Since, in the court's view, the state agency could not be compelled to act beyond its statutory authority, the court concluded that the Director had no power to enforce the Indian treaty rights by restricting non-treaty fishing. 88 Wash. 2d at 684-689, 565 P. 2d at 1154-1157. The court also stated that, even if the necessary state authority had existed, any allocation of fishing opportunity between treaty Indians and non-treaty fishermen would violate the constitutional guarantee of equal protection. 88 Wash. 2d at 684, 565 P. 2d at 1154. Declining to follow the federal courts' decisions in *United States* v. *Washington, supra*, the state court held that the treaties guaranteed to the Indians only the same

[7]The court stated that it had "full confidence that the director will abide by our decision." 88 Wash. 2d at 680, 565 P. 2d at 1154. Subsequently, the non-Indian fishing associations filed another motion for mandamus, contending that the Director of Fisheries apparently was still following the orders of the federal district court and that the writ of mandamus was thus necessary to enforce the judgment of the state court. The court heard argument on the motion on October 31, 1977, and the matter is still under submission.

opportunities to fish as are enjoyed by non-treaty fishermen. The court concluded that state regulations are thus valid only so long as they treat all fishermen alike. 88 Wash. 2d at 689-693, 565 P. 2d at 1157-1159.

In *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson*, 89 Wash. 2d 276, 571 P. 2d 1373, the second state case of which review is sought (Pet. No. 77-983), the non-Indian fishing associations initiated an action for declaratory and injunctive relief in the Superior Court for Thurston County, Washington. The superior court held that the challenged state regulations were invalid because they exceeded state statutory authority. On appeal, the state supreme court initially dismissed the case as moot, because the fishing season to which the regulations pertained had passed. 87 Wash. 2d 417, 553 P. 2d 113. On petition for rehearing, however, the court agreed to reach the merits and, on November 23, 1977, it issued an opinion reaffirming the conclusions it had reached in *Puget Sound Gillnetters Association* v. *Moos, supra*.

3. *Implementation of the federal court's decree.*

a. *The Washington Fishery Case.*

As the state court litigation gradually indicated that Washington would not be able to comply with the federal court's judgment, the United States and the tribes again invoked the continuing jurisdiction of the district court in *United States* v. *Washington*. During August and September 1977, that court issued a series of orders designed to protect the Indians' treaty rights (Pet. App. A-35 to A-92). By orders dated August 10 and 31, 1977, the federal court determined the treaty Indians' proper share of the 1977 harvest and expressly removed that share from the jurisdiction and control of the State of Washington (Pet. App. A-35 to A-61). The court stated

that "[j]urisdiction and harvest control over all allocations for treaty fisheries is hereby vested in this court. The defendants * * * are hereby enjoined from exercising jurisdiction or any form of harvest management, authorization or control over, or in any manner regulating, restricting, prohibiting or interfering with the taking, fishing for, possessing or disposing of, the fish comprising that portion of any run allocated by this court to the treaty fisheries * * * " (Pet. App. A-56).

This action of the federal court, undertaken "reluctantly, but necessarily" (Pet. App. A-55), was compelled by the state court rulings that the Department of Fisheries could not lawfully allocate the fish catch. Under the federal court order, the Department of Fisheries no longer was required to allocate the catch between treaty and non-treaty fishermen, because it no longer had control over the treaty Indians' share; the Department's only obligation was to ensure that non-treaty fishermen did not harvest in excess of the numbers authorized by the federal court. Even this task, however, was frustrated by the state court decisions, which effectively prevented the State from enforcing any restrictions against non-treaty fishermen. At several hearings before the federal court, the State's Assistant Attorney General acknowledged that restrictions on non-treaty fishing could be enforced only if the federal court entered an injunction running directly against the non-treaty fishermen, with violators punished through the contempt process. See, *e.g.*, *United States* v. *Washington*, Transcript of August 25, 1977, pp. 59-63;

Transcript of August 26, 1977, pp. 31-33; Transcript of August 30, 1977, pp. 20-21.[8]

Accordingly, on August 31, 1977, and September 27, 1977, the district court issued injunctions against the non-treaty fishermen, prohibiting all net salmon fishing in certain specified geographic areas except during such times and in such places as are authorized by regulations conforming to the court's prior orders (Pet. App. A-79 to A-87, A-89 to A-92).[9] The court directed the State of Washington and the United States to cite any fisherman who, having received notice of the injunction, thereafter fished illegally, and to require him to appear before the court to show cause why he should not be held in contempt (Pet. App. A-91).

The non-treaty fishermen sought review of these orders by filing a petition for a writ of mandamus in the United States Court of Appeals for the Ninth Circuit. At approximately the same time, the State of Washington appealed from all of the district court's orders relating to the 1977 season. The court of appeals permitted the non-treaty fishermen to intervene in the State's appeals, and the appeals and the mandamus proceeding were consolidated.[10] On April 24, 1978, the court of appeals

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[8]State citations based on violations of state regulations promulgated to comply with the federal judgment are routinely dismissed by the state trial courts. See Brief of Petitioners in Support of Application for Writ of Mandamus, filed in September 1976, in *Puget Sound Gillnetters Association* v. *Moos*, 88 Wash. 2d 677, 565 P. 2d 1151.

[9]The procedures for determining open fishing times and areas are specified in the injunction of September 27, 1977 (Pet. App. A-90 to A-91).

[10]These cases were also consolidated with an appeal and a mandamus proceeding seeking review of similar orders entered by the

issued its opinion in these consolidated Washington Fishery cases, in which it affirmed the district court in all respects (Pet. App. A-1 to A-28).

In its Washington Fishery decision, the court of appeals described the background against which it reviewed the district court's implementation orders (Pet. App. A-3):

> The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases [citations omitted], the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.

The court then reaffirmed the validity of the district court's treaty interpretation (Pet. App. A-3 to A-9).[11] The court also rejected petitioners' contention that in allocating the 1977 harvest the district court had exceeded

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United States District Court for the District of Oregon to implement the prior decisions in *Sohappy* v. *Smith*, 302 F. Supp. 899 (D. Ore.), and *United States* v. *Oregon*, 529 F. 2d 570 (CA. 9)). No party to the Oregon litigation has sought review in this Court, although the court of appeals' disposition of that matter was identical to its disposition of the Washington Fishery case.

[11]In concurring opinions, Judges Wallace and Kennedy stated that "it has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation of [the Indians'] treaty rights" (Pet. App. A-28). Nevertheless, both judges considered the decision in this case to be required by the court's prior decision in *United States* v. *Washington*, 520 F. 2d 676, certiorari denied, 423 U.S. 1086.

the intent of its original decision, which called only for an equal division of fishing opportunity and did not purport to guarantee the Indians specific numbers of fish (Pet. App. A-11 to A-13). The court held that "[c]onsidered in light of the record as a whole, the orders allocate only the opportunity to take fish. That allocation can best be expressed and enforced, of course, by numbers of fish taken" (Pet. App. A-11, n. 6). The court found "no abuse of discretion in the district court's orders allocating the opportunity to take fish. * * * If the nontribal fishery were not limited, the tribal fishery would never have the opportunity to take its full share * * *. Preserving the tribal opportunity requires limiting the nontribal opportunity" (Pet. App. A-13). Finally, the court of appeals rejected the claim that an allocation of fishing rights among Indians and non-Indians pursuant to the treaties constitutes a denial of equal protection (Pet. App. A-6 to A-8). The rights of the treaty tribes are based on their historical treaty status as the successors to sovereign entities and not on their race (*ibid.*).

The court then turned to the questions of enforcement. The court affirmed the district court's injunctions against the nontreaty fishermen, holding that, even though the fishermen were not parties to the litigation, they "are in privity with the [State of Washington]" and may thus properly be bound by the district court's orders (Pet. App. A-19 to A-20). The court of appeals concluded that "the district court had authority to act against the fishers directly when it appeared that the state was unable to do so" and that the fishermen "are subject to penalties for contempt if they have actual knowledge of the court's orders and violate them" (Pet. App. A-20).

b. *The 1978 Enforcement Order.*

The State of Washington's inability to manage its fisheries and enforce regulations to comply with the federal court decisions was unchanged at the end of the

1977 fishing season. Accordingly, on June 6, 1978, the district court issued an enforcement order to govern during 1978 and subsequent fishing seasons (Pet. No. 78-139, App. C-1 to C-5). In all material respects, the 1978 Enforcement Order (which petitioners in No. 78-139 seek to have reviewed before judgment in the court of appeals)[12] is identical to the 1977 Enforcement Order reviewed and affirmed by the court of appeals in the Washington Fishery case. Like the 1977 order, the 1978 Enforcement Order enjoins all non-treaty fishing except for fishing conducted in accordance with procedures established by the court (Pet. No. 78-139, App. C-2, C-3). Violations of the court's injunction are punishable by contempt (*id.* at C-4).

c. *The International Fishery Case.*

In the original litigation in *United States* v. *Washington, supra*, the State of Washington argued that the Convention of May 26, 1930, between the United States and Canada, 50 Stat. 1355, as amended by 8 U.S.T. 1058, abolished Indian fishing rights with respect to Fraser River salmon. This Convention provides for an equal division of the catch of Fraser River salmon between Canadian and American fishermen and establishes the International Pacific Salmon Fisheries Commission to implement the agreement. 8 U.S.T. 1060. The Commission proposes regulations each year to govern the time and manner in which Fraser River salmon may be taken by the fishermen of each country. These proposed regulations become effective on approval

[12]A notice of appeal from the 1978 Enforcement Order has been filed and the matter is now pending in the court of appeals (C.A. 9, No. 78-2523). The appeal was taken only by the Washington Reef Net Owners Association, which is not a petitioner before this Court. But see note 18, *infra*.

by each nation. *Ibid.* The State of Washington customarily enacts the Commission's regulations verbatim into state law and enforces them as state law.[13]

The United States took the position that the Convention was not intended to affect the domestic allocation of fishing opportunity within the United States, and that nothing in the Convention conflicted with the tribes' rights to harvest a fair share of the United States' portion of the Fraser River fishery. Both the district court and the court of appeals agreed that the Convention with Canada neither explicitly nor implicitly repealed the Indian treaties (384 F. Supp. at 411; 520 F. 2d at 689-690). Both courts held, however, that all fishermen, including treaty Indians, must comply with the Commission regulations. *Ibid.*

Thereafter, the United States attempted, through its members on the Commission and through diplomatic channels, to have the Commission alter its regulations to permit a special Indian fishery within the United States' entitlement. Because these efforts were unsuccessful, the United States, through the Department of State, withdrew its approval of a portion of the Commission's regulations for the 1975 season (Pet. App. A-122). Following this action, the district court ordered the State of Washington to restructure its regulations (which had incorporated the

[13]Pursuant to the Sockeye Salmon Fishery Act of 1947, 61 Stat. 511, as amended, 16 U.S.C. 776 *et seq.*, the President was to designate a federal agency responsible for enforcement of the Convention and the Commission regulations. The federal agency designated by the President, the National Marine Fisheries Service, may in turn authorize the State of Washington to act as the enforcing agent. 16 U.S.C. 776d.

Commission regulations) to permit a special treaty fishery for the United States' share of the Fraser River runs (Pet. App. A-105 to A-124).[14]

The State of Washington appealed and, on April 24, 1978, the court of appeals dismissed the appeal as moot (Pet. App. A-29 to A-33). First, the court of appeals noted that the district court's order pertained only to regulations for the 1975 season and had therefore lapsed (Pet. App. A-30). Furthermore, the court determined that the case was not one "capable of repetition, yet evading review," because the International Commission regulatory system that was in effect during the 1975 season had been abandoned by the United States (Pet. App. A-31). Commencing in 1977, the United States assumed direct regulatory and enforcement control of the fishery pursuant to its authority under the Sockeye Salmon Fishery Act of 1947, 61 Stat. 511, as amended, 16 U.S.C. 776 *et seq*. See note 13, *supra*. The United States has now promulgated separate federal regulations to govern Indian fishing on Fraser River runs.[15] Since 1977, the State has neither enacted Commission regulations into state law nor had any authority to enforce such regulations.

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[14]As noted by the State of Washington (Pet. No. 78-119 at 31), the district court entered this order prior to the State Department's action. However, the district court stayed its order until the State Department advised the district court that it had withdrawn its approval of the Commission's regulations.

[15]The validity of these regulations was challenged in *Purse Seine Vessel Owners Association, et al.* v. *United States Department of State, et al.*, Civil No. C77-471M (W.D. Wash.). On July 8, 1977, the district court denied a preliminary injunction against enforcement of the regulations. By order dated September 27, 1977, the court of appeals affirmed the denial of injunctive relief (C.A. 9, No. 77-2988). The court of appeals also indicated that it would issue an opinion in the case, but has not done so to date. The merits of the case are still pending in the district court.

DISCUSSION

Many considerations argue against review by this Court of the present decisions. The issue of the fishing rights possessed by the Indian Tribes of Washington pursuant to treaties with the United States has been before the Court on many previous occasions, some very recent, and the basic principles are long since settled. The ruling of the district court is the product of a complex adjudication involving extended hearings and a massive record. In our view, the orders faithfully implement the decisions of this Court. The court of appeals has twice affirmed the basic decision and this Court has denied review. Orders embodying the same principles have been accepted by all parties in the neighboring State of Oregon. And, finally, the "conflict" in the State of Washington now urged as the primary ground for this Court's intervention results from proceedings which purported to relitigate issues finally resolved in the federal courts and which, in our view, should not have been entertained by the state courts.

In these circumstances, we would normally urge denial of the petitions for certiorari. But, whether or not it should have been allowed to happen, there is no blinking the fundamental conflict that now exists between the federal and state courts, both on the underlying treaty issue and on enforcement questions. Cf. *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 407. And, unfortunately, these differences are not of academic interest only; they have created very real practical problems.

First, the conflict of decisions has caused a grievous breakdown in the enforcement of fishery regulations. Despite the efforts of the United States and the district court, non-Indian fishing in violation of the court's decree

is rampant (Pet. App. A-83). The United States is concerned that a vital resource may be destroyed by overfishing, to the detriment of all fishermen and the local economy. If respect for the law is not soon restored, there will eventually be no salmon left for the litigants in these cases to fight over.

Second, the conflict between the federal and the state decisions has effectively prevented the State of Washington from managing its fisheries and has forced the federal district court to involve itself intimately in the day-to-day tasks of fisheries management. We believe that all parties to this litigation would prefer to see the management of the fishery returned to the state administrative entities whose familiarity and expertise in this area are unquestioned. As recognized by the court of appeals, however, the district court has been forced to assume this responsibility by the default of the State in enforcing the court's decree (Pet. App. A-3). Moreover, the state agencies cannot rectify their default while the decisions of the State's supreme court remain in effect (Pet. App. A-11).

Third, the default of the state government has required the United States to concentrate a disproportionate amount of its limited fisheries enforcement personnel on what is essentially a local enforcement problem. Agents of the National Marine Fisheries Service, the United States Fish and Wildlife Service, the United States Marshals Service, and the Coast Guard have been diverted from their regular duties to assist the district court in implementing the Indians' treaty rights. This has resulted in a reduction in the federal fisheries services available for the rest of the country and for the enforcement of the ocean fisheries programs governed by the Fishery Conservation and Management Act of 1976, Pub. L. 94-265, 90 Stat. 331, 16 U.S.C. 1801 *et seq.*

It is only under compulsion of these serious difficulties that we join petitioners in inviting the Court's intervention. Only this Court can lay to rest the conflict of decisions. And, one may hope, a clear ruling from this Court will enable the State to reassume its responsibility to administer its fishery laws in a manner consistent with the rights preserved to Indian tribes by treaties of this nation.[16]

1. The central issue in these cases is the proper interpretation of the treaty language guaranteeing the tribes the "right of taking fish, at all usual and accustomed grounds and stations, * * * in common with" other Washington citizens (Pet. App. A-131). In our view, that issue has been correctly decided by the district court and the court of appeals in the Washington Fishery case. The result reached in that case is an appropriate culmination of the unbroken line of decisions by this Court recognizing the special fishing rights reserved to the tribes under these treaties. *United States* v. *Winans,* 198 U.S. 371; *Tulee* v. *Washington,* 315; U.S. 681; *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392; *Department of Game* v. *Puyallup Tribe,* 414 U.S. 44; and *Puyallup Tribe* v. *Department of Game,* 433 U.S. 165. See, also, *Antoine* v. *Washington,* 420 U.S. 194. Under normal circumstances, we would accordingly urge that there is no need for further review of this issue by this Court at this time.

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[16]Counsel for the Puget Sound Gill Netters Association and the Purse Seine Vessel Owners Association, petitioners in No. 78-139 and respondents in No. 77-983, have authorized us to represent to the Court that, in the event the Court grants certiorari in these cases and upholds the decisions of the United States District Court and overturns the decision of the Supreme Court of Washington, the Associations will take all possible steps to secure compliance by their members with the decision of the Court. We, of course, assume that the State officials concerned will act in like manner. Indeed, we

Unfortunately, however, a majority of the Washington Supreme Court still declines to accord effective recognition to Indian fishing rights guaranteed by federal treaties. Indeed, that court has most recently held that any attempt to implement those rights by apportioning the fishery resource between treaty fishermen and others violates the Equal Protection Clause of the Fourteenth Amendment. *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson, supra.* As the dissenting justices pointed out (571 P. 2d at 1383-1386), that ruling simply ignores this Court's holding in *Puyallup II* that the steelhead fishery of the Puyallup River must be "fairly apportioned" between the two groups, 414 U.S. at 48-49, and the Court's subsequent approval, in *Puyallup III,* of an allocation of 45 percent of the natural run to the Indian fishermen. 433 U.S. at 177. Apparently, there is yet need for a further pronouncement by this Court. In the circumstances, we can only suggest an express affirmance of the decision of the lower federal courts in the Washington Fishery case to put the issue to rest.[17]

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would have expected compliance by all parties with the orders of the federal courts in this matter from the start.

[17]Neither the doctrine of *res judicata* nor law of the case would appear to prevent this Court from making a determination on the merits of the treaty issue in the Washington Fishery case. See *Mercer* v. *Theriot*, 377 U.S. 152, 153-154; *Reece* v. *Georgia*, 350 U.S. 85, 87. As stated in *Reece* v. *Georgia, supra,* 350 U.S. at 87, this Court has "jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation," notwithstanding the fact that such questions became the law of the case, insofar as the lower courts were concerned, upon denial of the first petition for certiorari filed by the State. On the other hand, it is equally clear that the rationale of *Reece* v. *Georgia* in no way empowered the state courts to reach the same issues, since those courts have no jurisdiction, at any stage of the litigation, to "review" the judgments of the lower federal courts. See pp. 23-24, *infra.*

2. Like considerations, in our view, argue for granting review in the state cases as well—albeit, for several reasons, we do not believe the underlying issues should be decided in those cases and would not urge the Court to grant the petition seeking review of those decisions if the federal Washington Fishery case were not also before the Court on the merits.

We have already canvassed some of the defects of the state cases. See Memorandum for the United States as *Amicus Curiae* in No. 77-983, at 8-13. The incompleteness of the factual record and the absence of a truly adversary context are sufficient grounds for eschewing the state cases as a vehicle for deciding the basic controversy. What is more, we believe the courts of Washington should have declined to entertain actions which sought to relitigate issues already resolved, expressly or implicitly, by the courts of the United States.

It is settled that state courts must give *res judicata* effect to the judgments of the federal courts. *Stoll* v. *Gottlieb*, 305 U.S. 165, 170-172; 1B Moore's *Federal Practice*, para. 0.406[1] at 902-903 (2d ed. 1974). And that principle applies " 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell* v. *County of Sac*, 94 U.S. 351, 352." *Commissioner* v. *Sunnen*, 333 U.S. 591, 597. The State of Washington had a full opportunity to litigate the extent of its regulatory powers and obligations with regard to Indian treaty fishing in *United States* v. *Washington, supra.* The State was therefore precluded from relitigating that issue again in the state forum. Cf. *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313.

Moreover, the private associations that sued to enjoin the state officials in the state cases (petitioners in No. 78-139) were fully represented by the State in the federal

litigation. Since the personal rights claimed by the members of the private associations are merely the rights possessed by all citizens of the State to fish "in common" with the treaty Indians (10 Stat. 1133), the judgment against the State in *United States* v. *Washington, supra*, was binding on its citizens as privies with the State. See *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, 340-341. The federal judgment adverse to both the State and its citizens thus bars relitigation of the issue by these two parties against each other, as well as by either of the two against the United States. The state court should therefore have refrained from ruling on the merits in the two state cases.

Nor did the action of the state courts merely ignore principles of *res judicata*. Those courts have effectively enjoined state officials from taking action required of them by a federal district court judgment that had been affirmed by the court of appeals and had become final by denial of a petition for certiorari here. It is at least questionable whether such interference with the implementation of a final federal court decree was within the authority of the state tribunals. Cf. *Donovan* v. *City of Dallas*, 377 U.S. 408, 412-413 and cases cited at n. 11; *General Atomic Co.* v. *Felter*, 434 U.S. 12, 16. And, in any event, the federal court would probably have been justified in staying the effectiveness of the state court decrees. See *Mitchum* v. *Foster*, 407 U.S. 225, 235-237.

But, in all the circumstances, it is unprofitable to pursue the question whether the state courts should have declined the invitation to create a conflict of decisions. The fact is that state officers continue to invoke the "shield" of the Washington Supreme Court judgments in refusing to take an active role in implementing the federal court decision. Although the district judge has resorted to alternative means of enforcement, it is clearly preferable that state officers should themselves administer the

fishery. Accordingly, we urge this Court to grant the petition in the state cases in order to settle the issue whether the relevant state officials are bound to implement federal law in this matter notwithstanding the holding of the Washington Supreme Court that they would thereby be violating restraints imposed by state law.

3. In our view, the questions relating to enforcement of the district court's decrees are easily resolved once it is held that the original treaty interpretation was proper. The equitable tools used by the district court and affirmed by the court of appeals are not novel; they have been used by the federal courts repeatedly to enforce the civil rights of minorities in the face of recalcitrance by state officials and private parties. See, *e.g.*, *Cooper* v. *Aaron*, 358 U.S. 1, 11-12; *Bullock* v. *United States*, 265 F. 2d 683 (C.A. 6), certiorari denied, 360 U.S. 909. Nevertheless, in the hope that this controversy may be finally resolved without years of continued litigation, we suggest that the Court should consider and decide the enforcement questions as well as the underlying question of treaty interpretation.

That result can be achieved by reviewing the enforcement orders already affirmed by the court of appeals or by granting the petition in No. 77-139 insofar as it seeks review of the 1978 Enforcement Order before judgment in the court of appeals. That order is, as previously noted, identical in all material respects to the 1977 order which has been finally reviewed and affirmed by the court of appeals and is before this Court in the Washington Fishery case. In the special circumstances of this case, however, it may be appropriate for this Court also to review the Enforcement Order presently in effect.[18]

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[18]The Court would appear to have jurisdiction under 28 U.S.C. 1254(1) even though the present petitioners did not appeal to the

4. The State's request (Pet. No. 78-119 at 28-35) for review of the International Fishery case should be denied because, as the court of appeals held (Pet. App. A-30), that controversy is now moot. The 1975 orders of the district court that are involved in the case are no longer in effect (*ibid.*). Moreover, for the reasons stated by the court of appeals (*id.* at A-30 to A-31), the controversy is not one that is "capable of repetition, yet evading review." The United States has assumed direct regulatory and enforcement control over the internal allocation of the Fraser River fishery pursuant to the Convention between the United States and Canada, *supra,* and the Sockeye Salmon Fishery Act of 1947, 16 U.S.C. 776 *et seq.*[19] The State plays no part, and has no further regulatory responsibility, in this program (see pp. 17-18, *supra*).

Nevertheless, Washington claims a continuing interest in that its Director of Fisheries is a member of the International Pacific Salmon Fisheries Commission, which implements the international Convention (Pet. No. 78-119 at 34-35). Membership on the Commission, however, is a federal, not a state, position. The instructions the Director receives from the State Department in connection with

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court of appeals. See note 12, *supra.* We assume the present petitioners, as two of the groups enjoined by the district court's order of September 27, 1977 (Pet. App. A-89, A-90), became "parties" respondent when that ruling was challenged on appeal and, accordingly, have standing to file a petition for certiorari in this Court. See *United States* v. *Bankers Trust Co.,* 294 U.S. 240, 243; *United States* v. *United Mine Workers,* 330 U.S. 258; *Youngstown Co.* v. *Sawyer,* 343 U.S. 579.

[19]As previously noted, the validity of the current system will be resolved in other pending litigation. Any party may, of course, ask this Court to review that litigation at the appropriate time.

the Commission are executed by him in his capacity as a federal representative. The fact that he also holds a state job is irrelevant. The State of Washington has no litigable interest arising from the communications engaged in between the United States and its appointed representative.

Washington also claims that the case is not moot because it raises the underlying question whether the Indian treaties guarantee the tribes the opportunity to catch one-half of the salmon runs in the State's waters (see Pet. App. A-31). But the persistence of this underlying issue does not breathe life back into the expired orders of the district court in the International Fishery case. Moreover, the underlying question of the scope of the Indian treaty rights is presented in the Washington Fishery case and the state cases. There is no need for the Court to consider the same question in the context of the moot controversy over the orders in the International Fishery case.

CONCLUSION

For the foregoing reasons, the United States does not oppose a grant of certiorari except in respect of Question 6 as set forth on page ~~5~~ 4, *supra.*

Respectfully submitted.

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No. 78-119

IN THE

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OF THE

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OCTOBER TERM, 1978

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES and DONALD W. MOOS, Its Director,

Petitioners,

vs.

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Respondents,

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Intervenors-Respondents.

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES,

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vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF THE RESPONDENT, YAKIMA NATION, IN OPPOSITION

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BRIEF OF THE RESPONDENT, YAKIMA NATION, IN OPPOSITION

I.

QUESTION PRESENTED

Power of federal courts to protect treaty reserved rights and a national resource involving anadromous fish, where the action or inaction of a state and its citizens is adverse to both federal interests.

II.

CONSTITUTION AND TREATY PROVISIONS INVOLVED

A. **Constitutional Provisions:**

1. Article VI, Paragraph 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. Article III, Section 1:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish***."

3. Article 3, Section 2:

"The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their authority;***"

B. **Treaty with the Yakimas** (12 Stat. 951):

1. Article III, paragraph 2:

"The exclusive right of taking fish in all streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory***"

III.

STATEMENT OF THE CASE

Respondent, Yakima Indian Nation, objects to the petitioner's statement of the case, in that it omits certain pertinent facts essential to a full and complete statement; without which, petitioner's statement is strongly biased in petitioner's favor.

Full and accurate statements require discussion of an included companion case, wherein almost identical injunctive relief for which petitioner seeks review, was affirmed in the relevent decision of April 24, 1978 by the Court of Appeals for the Ninth Circuit. This now *res judicata* relief was granted by the Federal Court for the District of Oregon in *Columbia River Fishermens' Protective Union, Inc., et al.*, vs. *United States District Court for the District of Oregon*, 573 F2d 1123 (1978). (See Washington Petition Appendix A.) Likewise, full and accurate statements require the recitation of court recorded history of the treaty reserved fishing rights of the Yakima Indian Nation, a party to both rulings.

This Court, as well as other federal courts, has found it necessary to restrict state and non-Indian intrusions on the treaty fishing rights reserved by the Yakima Indian Nation in Article III of the *Treaty with the Yakimas* (12 Stat. 951).

The first case interpreting the Yakima Nation's

reserved fishing rights was *United States vs. Taylor*,[1] in which the Washington Territorial Supreme Court held that the Yakima Nation's reserved fishing rights encompassed the right to enjoy fishing to the same extent as they had at treaty time. Though this determination was made early on,[2] this was not the end of attempts to infringe upon the Yakima Nation's treaty reserved fishing rights. This Court by plenary action found it necessary to protect this particular treaty right reserved by the Yakima Nation in no less than three cases. *United States vs. Winans*, 198 U.S. 371 (1905); *Seufert Brothers Company vs. United States*, 249 U.S. 194 (1919) and *Tulee vs. State of Washington*, 315 U.S. 681 (1942).

Notwithstanding continued rejection of state and non-Indian claims (that petitioner again repeat), it has become necessary again in the last decade that immediate and continuing relief be sought from federal courts to protect the treaty reserved fishing rights of the Yakima Nation. Reserved fishing rights that needed protection were located, among other places on the Columbia River and on the Puget Sound. The Columbia River traverses the State of Washington and

[1] 3 Washington Territory Reports 88 (1887).

[2] 1887. The Yakima Treaty was ratified in 1859. Washington did not join the Union until 1889. It was established below in *United States vs. Washington* and *United States vs. Oregon*, infra, that at treaty times the Yakima Nation landed many more fish in numbers and percentage of the catch than their present share of the current landings.

in parts serves as the border between the State of Oregon and Washington. The Puget Sound is contained within the State of Washington and the border between the United States and Canada traverses the upper portions of Puget Sound.

In 1969, a decision filed by the Federal District Court for the District of Oregon in *United States vs. Oregon*,[3] reaffirmed the reserved fishing rights of the Yakima Nation in the Columbia River. Subsequently, in 1974, a decision of the Federal District Court for the Western District of Washington, in *United States vs. Washington*[4] established the reserved fishing rights of the Yakima Nation in Puget Sound waters. Both district courts retained jurisdiction for the purpose of enforcing its judgments and injunctive relief.[5] Though Washington was not an original party in the case affecting the treaty reserved rights on the Columbia, it was granted the right to intervene in *U.S. vs.*

[3] 302 F. Supp 899 (D. Ore 1969); *subsequent order* (providing for 50% share of Columbia River run for treaty reserved fishing) *affirmed*, 529 F 2d 570 (9th Cir. 1976). *Subsequent order aff'd* upholding enforcement orders under this decree like those petitioner wishes reviewed by the Ninth Circuit. 573 F 2d 1123, (9th Cir. 1978). Petition for certiorari not filed.

Washington is herein collaterally estopped from objecting to the litigated quantification of the treaty reserved fishing rights of Yakima Nation and court enforcement of that reserved right. *Commissioner vs. Sunnen*, 333 U.S. 591, 597 (1948).

[4] 384 F. Supp 312 (W.D. Wash. 1974), *aff'd*, 520 F2d 676 (9th Cir. 1975), *cert denied*, 423 U. S. 1086 (1976) *subsequent orders aff'd*, 573 F. 2d 1117, 1119, 1121, 1123 (9th Cir 1978).

[5] The district courts exhibited necessary foresight in retaining jurisdiction. Unfortunately, it has been necessary to continually enjoin breaches by the States of Oregon and Washington of the district courts decisions and orders.

Oregon, supra and during the times important to this discussion have been a party to that case.[6] Since their original decisions, both district courts have exercised their retained jurisdiction to protect the established treaty reserved fishing rights of the Yakima Nation and other Indian tribes. From the outset of the intervention of Washington in the Columbia River case and from the very announcement of the decision in the Puget Sound case, it became evident that Washington and its fishermen were going to attempt to frustrate the holdings of the two district courts and their later affirmance by the Court of Appeals for the Ninth Circuit. The Court of Appeals for the Ninth Circuit in the decision for which petitioners seek partial review took note of these "extraordinary machinations" in resisting the decree, observing that except for some of the desegregation cases, "the District Court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century."

While these "extraordinary machinations" were reaching their culmination in non-Indian resource destructive fishing, the State of Oregon and Indian tribes on the Columbia River were attempting to preserve the fishery on the Columbia through the vehicle of a

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[6] Washington was a party during the affirmation of subsequent orders by the Court of Appeals for the Ninth Circuit. (529 F 2d 570, (1976); 573 F 2d, 1123 (1978) from which no review has been sought.

joint management plan. This plan was finally made possible by the Columbia River tribes agreeing for a period of five years to forego exercising some of their established treaty reserved fishing rights. In February of 1978, the management plan was signed by the Columbia River tribes, the State of Oregon, the State of Washington, and the United States. This approved plan was adopted by the federal court by an agreed order with all parties including petitioner Washington and respondent, agreeing thereto. Thereafter, Washington's fish management agencies and the Washington judiciary claimed that Washington had no authority to agree to the plan and therefore could not fulfill its obligation to regulate non-Indian fishermen under the agreed plan. Washington did not move to amend the plan or the resulting agreed order, but attempted to hold the Indian tribes to their obligations under the plan, while claiming that Washington courts would not allow them to fulfill their obligation under the plan. Based on this lack of authority, Washington frustrated the plan and illegal, wasteful fishing resulted on the Columbia so that the Indians were unable to land their reduced share under the approved plan without seriously jeopardizing the necessary escapement. This resulted in the Indians obtaining, even with the district court's necessary assistance, (which was affirmed by the Ninth Circuit Court of Appeals) considerably less

than the share of the harvest agreed to by Washington and Oregon. It was only through the actions of the Federal Court for the District of Oregon, which parallel the actions that petitioners wish to have reviewed, that non-Indian fishermen were restrained from illegally taking even a larger amount of the established treaty reserved share guaranteed by the agreed management plan.

Though the petitioners do not and can not contend that federal court action to prevent intrusions on the treaty reserved fishing rights and national resource in the Columbia River is improper; they do make this contention, as regards the same rights of the Yakimas and the same national resource, in the Puget Sound case area. The record in the Puget Sound case area, is just as clear, that absent action of the federal courts, intrusion on treaty reserved fishing rights and damage to runs of anadromous fish will result.

Other respondents have more completely detailed the intrusions on the Yakima Nation's treaty reserved rights and the danger to the resource. However, it is clear from any review of the factual situation or claims of the petitioners, that the State of Washington is unable or unwilling to act according to the federally determined law of this land to protect either determined treaty reserved rights or runs of anadromous fish. Petitioner's contention, both in media and judicial

forums, is that the federal courts in their recognition of a treaty reserved right in the fisheries are totally wrong and the only acceptable solution is that the federal courts reverse their recognition of this reserved right and repose control of this fishery in the State of Washington which will not make any allocation for treaty reserved rights.

IV

ARGUMENT

This Court must not, through the granting of writs of certiorari, support petitioner's acts of *nullification.*[7] Quite clearly, petitioners in this and other petitions, including the contrived petition in *State of Washington vs. Washington State Commercial Passenger Fishing Vessel Association,* 77-983[8] and the petitions in *State of Washington vs. United States,* 78-119 and *Puget Sound Gillnetters vs. U.S. District Court for Western Washington,* 78-139; are primarily seeking to overturn a fully adjudicated determination of treaty reserved fishing rights. Respondent acknowledges that petitioner presents the question of district court enforcement of a fully adjudicated decree, but this clearly is

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[7] Washington and its allies, present actions are so similar to the actions of the Southern States in the first half of the nineteen century; that "nullification" is clearly the word to be used. See: Hendrick, *Bulwark of the Republic,* "The Rise and Fall of Nullification", pp 191-258.

At this early time, "nullification" was defined as: "nullification, anarchy reduced to a system" (p. 255). We adopt that definition.

[8] *Puget Sound Gillnetters vs. Moos,* 88 Wn. 2d 677, 565 p2d 1151 (1977) is included in 77-983.

an attempted door opener to contest the fully adjudicated determination of involved treaty reserved rights.[9] The State of Washington, through concerted executive, legislative and judicial action, in concert with its allies, has followed a course of action that has as its acknowledged purpose the destruction of fully adjudicated treaty reserved rights. If this court wishes to bestow awards for judicial gamemanship, it could not do better than to grant the petitions in 77-983, 78-119 and 78-139.

However, the granting of the petitions will have the practical effect of forestalling a resolution of the controversy in the Puget Sound case area similar to the one that exists in the Columbia River case area. Likewise, if the petitions are granted, it must be acknowledged that the State of Oregon would be politically forced to follow Washington's now successful path of fostering controversy.

Further, there can be no doubt that if this court grants certiorari that the continuing state sponsored

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[9] There may be those who would favor Supreme Court Review of the underlying adjudication of the treaty reserved fishing rights in an attempt to obtain Washington's compliance with the declared law of the land. Tempting as this may be, Respondent is not a member of that school. Experience has taught Respondent that appellate court affirmance has not dissapated the venom directed against the District Court or in any way assured compliance with the District Court's orders. Likewise, there is no indication in Washington's briefs, that there has been acceptance—in other than a most limited way—of this Court's past rulings involving the Yakima Treaty. Finally, and most important; the underlying adjudication is *re judicata*. It should not be raised at this time.

controversy will result in continued illegal fishing during the pendency of this court's plenary determination. Encouragement of this rebellion with its disasterous effects on the lower courts, the fishery and fully adjudicated treaty fishing rights, is undoubtedly of great concern to this court.

Washington's executive and judiciary throwing down the gauntlet in the federal area of *treaty rights* is unprecedented for over one hundred years. As this court has reminded us in *Missouri v. Holland,* 252 U.S. 416 (1920), a treaty made by the President with the required concurrence of two thirds of the Senate is, under the supremacy Clause of Article VI § 2, part of "the supreme Law of the land" which takes precedence over contrary state law.

Article III of the *Constitution* makes it just as clear that "*all* cases" "arising under treaties" are within the judicial power of the United States which is vested in the "Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Petitioner's reliance on Article X to excuse this conflict is inapposite. Article X must give way to Article VI and Article III, which, with absolute clarity and without exception, gives the right of way to the national authority. *Missouri v. Holland, supra.*

Washington, with its allies' assistance, having interjected itself into the national right of way in the

vehicle of the cases of *Puget Sound Gillnetters, supra,* and *Washington State Commercial Passenger Fishing Vessel Association, supra,* (pending in 77-983), now seek to use this feigned vehicle to supply a collision as a basis for a writ. This feigned vehicle does not supply the necessary conflict. It does not assume the honest and actual antagonistic assertion of rights to be adjudicated — a safeguard essential to the integrity of the judicial process, and one held by this Court to be indispensable to the adjudication of questions by this Court. *United States vs. Johnson,* 319 U.S. 302 (1942).

Washington, and its allies, seek to invade the national right of way only for the purpose of collision and to make the national right of way rough. Washington and its allies readily agree that they are unable to take any action to preserve the national interests. The record is clear that this inability is joined with their unwillingness. The efforts of the United States Court for the Western District of Washington affirmed by the Court of Appeals for the Ninth Circuit are necessary efforts to smooth the state inspired rough spots in the national right of way.

Any lesser efforts would be an abdication of the national purpose so explicitly contained in the Constitution. This Court has made it clear that the lower courts have a duty to fashion such a remedy to correct a systematic invasion of this national right of way.

Milliken v. Bradley, 433 U.S. 267, 280 (1977); *Swann v. Charlotte - Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971); *Hecht Company vs. Bowles,* 321 U.S. 321, 329 (1944); *Hutto v. Finney,* ..... U.S. ..... 46 L. Week 4817, 4819 (June, 1978).

The actions of Washington, and its allies, have presented this court with a very serious problem. No matter what action this court takes in granting or denying certiorari, the announcement of the decision will support the continuing dedicated resistance to the announced law of the land. If certiorari is granted, as officials in Washington have promised the non-Indian fishermen, we can expect only totally uncontrollable, illegal fishing in the Puget Sound area and moves to force Oregon to pursue the same course in the Columbia River area. This action can seriously jeopardize not only the adjudicated reserved rights of the treaty fishermen, but the resource as well. While the danger to the adjudicated reserved rights and the total resource will be lessened by the denial of certiorari on all petitions, the unanswered rulings of the State will pose a problem. This is an extraordinary case and one that calls for this court to pursue extra-ordinary methods in announcing its decision on certiorari. Respondent is fully cognizant of the pressures that generally prohibits this Court from explaining its granting or denial of certiorari. However, this case would seem

to call for an opinion accompanying the court's ruling in 77-983 such as this Court has deemed necessary in cases like *Bryant vs. Ohio*, 362 U.S. 906 (1960) and *Maryland vs. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950).

CONCLUSION

For the above reasons, writs of certiorari should not issue in 77-983, 78-119 and 78-139. Denial of writ in feigned 77-983 should be explained.

Respectfully submitted,

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Yakima Indian Nation

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 1978, three copies of this brief in opposition were mailed in a United States mailbox, first class postage prepaid, to Slade Gorton, Edward B. Mackie, James M. Johnson, Counsel for State of Washington, Temple of Justice, Olympia, Washington 98504; to Charles T. Yates, Moriarty, Long, Counsel for Puget Sound Gillnetters Association, Mikkelborg & Broz, 330 Seattle First National Bank Building, Seattle, Washington 98154, and to Joseph T. Mijich, John P. World, Counsel for Purse Seine Vessel Owners Association, 3920 Bank

of California Center, Seattle, Washington 98164. I further certify that all parties required to be served have been served.

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of Hovis, Cockrill & Roy
Counsel for Respondent Yakima Nation and Member of The Bar of this Court.

Supreme Court, U. S.
FILED
SEP 21 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1978
No. 78-119

State of Washington, Department of Fisheries
and DONALD W. MOOS, ITS DIRECTOR,
Petitoners,

vs.

UNITED STATES OF AMERICA,
Respondents,

MAKAH TRIBE, LOWER ELWHA BAND OF CLALLAM TRIBE, PORT GAMBLE BAND OF CALLAM TRIBE, SUQUAMISH TRIBE, LUMMI TRIBE, NOOKSACK TRIBE, and SWINOMISH INDIAN TRIBAL COMMUNITY,
Intervenors-Respondents.

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES,
Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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STATEMENT OF FACTS

The decision of the United States Court of Appeals for the 9th Circuit which the state of Washington seeks to have reviewed by this Court involved

five separate cases. Three of those cases (Nos. 77-3129, 77-3654 and 77-3655) arose from decisions of the United States District Court for the Western District of Washington under its continuing jurisdiction in the "Puget Sound case," United States v.Washington, 384 F Supp 312 (W D WA 1974), 520 F2d 676 (9th Cir 1975), cert den 423 U S 1086 (1976) and two of the appeals (Nos. 77-3208 and 77-3209) arose from decisions of the United States District Court for the District of Oregon under its continuing jurisdiction in the "Columbia River Case," United States v. Oregon, 302 F Supp 899 (1969). The state of Washington is a party defendant in both District Court cases and the Confederated Tribes of the Warm Springs Reservation of Oregon is a party only to the Columbia River case.

United States v. Oregon, 302 F Supp 899 (D Or 1969) was originally brought by the United States as plaintiff with only the state of Oregon as defendant and the four treaty tribes, the Warm Springs, (Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 96); Yakima, (Treaty with the Yakima Tribe, June 9, 1855, 12 Stat. 951); Umatilla (Treaty with the Umatilla Tribe, June 9, 1855, 12 Stat. 945); and Nez Perce (Treaty with the Nez Perce Tribe, June 11, 1855, 12 Stat. 957) as intervenors. In that decision the District Court upheld the off-reservation treaty fishing rights of the intervenor tribes in the Columbia River and decreed that the state agencies managing the runs of anadramous fish in the Columbia River must provide the

Tribes with the opportunity to take a "fair share" of any harvestable surplus of any run of anadramous fish destined for the Tribes' usual and accustomed fishing grounds and stations along the Solumbia River. Oregon did not appeal that decision.

The District Court for the District of Oregon retained continuing jurisdiction and during the next several years there were many additional hearings in the case. In each instance but one (where the Court reversed itself eight days later) the United States and the intervenor Tribes prevailed and relief was granted. The state of Oregon did not appeal any of these orders.

Following the decision in the United States District Court for the Western District of Washington in United States v. Washington, supra, the state of Washington intervened as a party defendant in the Columbia River case and the District Court for Oregon decreed that the treaty Indians should have the opportunity to harvest 50% of the harvestable surplus of the 1974 run of spring chinook destined for their usual and accustomed fishing grounds. Both Oregon and Washington appealed that order and the Court of Appeals for the 9th Circuit affirmed the decision on January 28, 1976. United States v. Oregon, 529 F2d 570 (9th Cir 1976) Neither defendant state sought review in this Court.

The controversy continued for several years. Finally, at the urging of the Honorable Robert J. Belloni of

the District Court for the District of Oregon the parties to the Columbia River case entered into intensive and difficult negotiations and finally arrived at an agreement which was incorporated in a "Plan for Managing Fisheries on Stocks Originating from the Columbia River and its Tributaries above Bonneville Dam". (A-1) This Plan was accepted and signed by the governors of the states of Oregon and Washington and the leaders of the four intervenor tribes as well as the United States and was approved and adopted by Court order of February 28, 1977. This plan does not strictly follow the court interpretations of the extent of the treaty fishing rights, but reflects a compromise accepted by all parties.

Since the adoption of this plan, the situation with regard to Columbia River Fisheries has become much less antagonistic and controversial. It has not been necessary for the District Court to review nearly every action of the state fisheries agencies, as was previously the situation. The present appeals arose from an order of the District Court for Oregon enforcing the provisions of the plan (No. 77-3209) and from a petition for writ of prohibition or mandamus by non-Indian fishing interests challenging the terms of the plan (No. 77-3208). All of the parties to United States v. Oregon, resisted the challenge to the Oregon District Court's orders in the 9th Circuit except Washington which took the extraordinary position that it had no authority to agree to the compromise settlement which the governor and Attorney General signed

in 1977 and which became a stipulated order of the Court. The state of Oregon not only has never appealed to this Court for review but advocated the position adopted by the 9th Circuit in these cases.

REASONS FOR DENYING WRIT

As this Court is well aware and as the 9th Circuit has frequently pointed out the controversy over the recognition of these treaty fishing rights of the Indian tribes of the Pacific Northwest is rivaled only by the controversy over some of the desegration cases.

Washington has a long history of refusing to recognize treaty Indian fishing rights. Many of the leading cases in this Court involved Washington's contention that the treaty created no special rights for the Indian. United States v. Winans, 198 U S 371 (1905), Tulee v. Washington, 315 U S 681 (1942), Puyallup Tribe v. Department of Game, 381 U S 392 (1968), Department of Game v. Puyallup Tribe, 414 U S 44 (1973), Puyallup Tribe v. Department of Game, 433 U S 165 (1977).

During the long history of the Puget Sound case, judges of the Ninth Circuit have repeatedly commented on Washington's attitude towards compliance with the law regarding treaty Indian fishing rights.

Speaking for the majority in U.S. v. Washington, 520 F2d 676, 685 (9th Cir 1975 Choy, Circuit Judge said:

"In treating treaty Indian fishermen no differently from other citizens of the state, the state has rendered the treaty guarantees nugatory."

In the same case, Burns District Judge, concurring, added this insight from the viewpoint of a District Judge:

"I deplore situations that make it necessary for us to become enduring managers of the fisheries, forests, and highways, to say nothing of school districts, police department and so on. The record in this case, and the history set forth in the Puyallap and Antoine cases, among others, make it crystal clear that it has been recalcitrance of Washington state officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the District Court. This responsibility should neither escape notice nor be forgotten." 520 F2d at 693.

This stubborn attitude was also apparent to the Court when it rendered the current opinion which Washington seeks to have reviewed. Goodwin, Circuit Judge, speaking for the majority said:

"Agencies of the State of Washington and various of its constituencies continue to attack the judgment in United States v. Washington. Accordingly, we will again set forth the treaty basis of

that decision and reaffirm its validity. The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases (see Morgan v. Kerrigan, 530 F2d 401 (1st Cir.), cert. denied sub nom. McDonough v. Morgan, 426 U.S. 935, 96 S.Ct. 2649, 49 L.Ed2d 386 (1976); Morgan v. McDonough, 540 F2d 527 (1st Cir. 1976), cert. denied, 429 U.S. 1042, 97 S.Ct. 743, 50 L.Ed2d 755 (1977), the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice." 573 F2d at 1126

In the most recent appearance before the Ninth Circuit of cases arising out of U.S. v. Washington, in the United States of America v. Olander et al, consolidated appeals of contempt citations issued against non-treaty fishermen, in the opinion filed September 7, 1978, Circuit Judge Dunaway commented on Washington's attitude:

"All of these cases arise from the efforts of the United States District Court for the Western District of Washington to enforce its decree in United States v.

> Washington, W.D. Wash., 1974, 384 F. Supp 312, aff'd, 9 Cir. 1975, 520 F2d 676, cert. denied, 423 U.S. 1086. The district court, finding its decree opposed and frustrated by the executive and judicial departments of the State of Washington, and by the organized and vocal defiance of the commercial fishermen in the State of Washington, felt compelled to implement its judgment by the issuance of an injunction." (Op 1-2)

It is clear from the history of this litigation that the Washington state officals are responding in part to the demands of their vocal non-Indian constituencies. The justices of the Washington Supreme Court are also subject to the pressures of those same constituencies and just as in the desegregation cases, elected state officials, including judges, cannot be expected to carry out the law when that law is overwhelmingly unpopular with the vast majority of the voters of the state. Only the federal courts can provide such protection.

In spite of the bitterness of the controversy, all parties to the Columbia River litigation except Washington have found it possible to accept the legal principles laid down by the Court and in fact have entered into a compromise settlement which was embodied in the District Court's order of February 28, 1977. Such a solution is obviously preferable to continual lititation over these fishing rights. The four tribes

in United States v. Oregon, as well as the State of Oregon and the United States have worked long and hard to make this settlement work. To grant review of this decision which involves the Columbia River and upheld the compromise settlement would punish those who in good faith have attempted to follow the Courts' interpretation of law and to resolve their differences by negotiation while rewarding the state of Washington and non-Treaty fishers whose recalcitrance have gone to extraordinary lengths, including open criticism of the decision and the District Court by the Washington Attorney General's office and massive civil disobedience by non-Indian fishers in an attempt to circumvent the Court orders.

An examination of the questions presented in the Petition for Writ of Certiorari by the State of Washington (Pet. 4-5) makes it apparent that what Washington is asking is to have the basic legal principle underlying both United States v. Washington, supra and United States v. Oregon, supra reviewed by this Court in spite of the fact that both of those decisions have become final. The key question in both cases is the interpretation of the language of the Indian treaties reserving to the Tribes the right to fish off reservation at all usual and accustomed fishing grounds and station "in common with citizens". In 1976, when a full and complete record of the trial on that issue was available, this court denied certiorari in United States v. Washington. When the United states Court of Appeals for the Ninth Circuit affirmed

the fifty percent allocation formula for the Spring Chinook run in 1974, neither Oregon nor Washington sought review in this Court. While the allocation formula has been changed on the Columbia River as a result of the stipulated settlement, the Court interpretation of the treaty language is the basis for that settlement. For this Court to grant certiorari can only lead to a destruction of the peaceful solution achieved on the Columbia River and inspire Washington and the non-Indian fishers to continue to ignore the treaty rights of the Indian tribes.

CONCLUSION

The State of Washington and the non-Indian fishers have steadfastly refused to abide by the Court's decisions on treaty Indian fishing rights. Review of the history of Indian fishing rights cases in this Court as well as a review of the history of the present cases, shows Washington's steadfast intransigence.

Washington now asks this Court to review decisions that have become final years ago. This request should not be granted.

The Confederated Tribes of the Warm Springs Reservation of Oregon respectfully requests that the Application for Writ of Certiorari be denied.

DATED this 20th day of September, 1978.

PANNER, JOHNSON, MARCEAU,
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiffs, v. STATE OF OREGON, Defendant, and THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON; CONFEDERATED TRIBES & BANDS OF THE YAKIMA INDIAN NATION; CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION; and NEZ PERCE TRIBE OF IDAHO, Intervenors, STATE OF WASHINGTON,	CIVIL NO. 68-513 MOTION

Intervenor.)

All parties hereby move this Court for an Order approving the Plan for Managing Fisheries on Stocks Originating from the Columbia River and its Tributaries Above Bonneville Dam, which is attached hereto as Exhibit "A."

DATED February 28, 1977.

Respectfully submitted,

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Assistant Attorney General
Attorney for Oregon Fish
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/s/ James M. Johnson
James M. Johnson
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Perce Tribe of Idaho

/s/ Douglas R. Nash
Douglas R. Nash
Attorney for Umatilla
Tribe

IT IS SO ORDERED.

/s/ ROBERT J. BELLONI
ROBERT J. BELLONI
United States District Judge

A PLAN FOR MANAGING FISHERIES ON STOCKS ORIGINATING FROM THE COLUMBIA RIVER AND ITS TRIBUTARIES ABOVE BONNEVILLE DAM

The purpose of the plan shall be to maintain, perpetuate and enhance anadromous fish and other fish stocks originating in the Columbia River and tributaties above Bonneville Dam for the benefit of present and future generations, and to insure that the Nez Perce Tribe of Idaho, Confederated Tribes of the Umatilla Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakima Indian Nation,

hereinafter called Tribes, having the right to fish based on a treaty with the United States are accorded the opportunity for their fair share of harvest, and to provide for a fair share of the harvest by nontreaty user groups.

This plan is based upon the unique circumstances relating to the Columbia River system and the parties hereto and does not necessarily have application in other fisheries.

The parties also recognize the substantial management problems resulting from the ocean harvest of mixed stocks of anadromous fish originating from the upper Columbia River and its tributaries and the wastage resulting from fishing on immature stocks. The parties will continue joint efforts to collect and gather data on this fishery and to reduce inefficient and wasteful harvest methods.

Due to the environmental factors totally unrelated to the treaty or nontreaty fisheries, there has been a continual decline of some runs of anadromous fish in the Columbia River system. This trend could deprive not only the treaty Indians, but also other user groups of the opportunity to harvest anadromous fish. The parties pledge to work cooperatively to maintain the present production of each run, rehabilitate runs to their maximum potential and to work towards the enhancement and development of larger and additional runs where biologically and economically feasible.

(1) The managing fishery agencies shall make every effort to allocate the available harvest as prescribed in this agreement on an annual basis. However, because run size cannot always be accurately calculated until some lower fishery has taken place, annual adjustment of the sharing formulas for each species may be required to provide the appropriate shares between treaty and nontreaty users. If treaty and nontreaty users are not provided the opportunity to harvest their fair share of any run as provided for in this plan, every effort shall be made to make up such deficiencies during the next succeeding run of the same race. Overall adjustments shall be made within a 5-year time frame.

(2) The treaty Indian tribes and state and federal agencies shall diligently pursue and promote through cooperative efforts the upriver maintenance and enhancement of fish habitat and hatchery rearing programs, and so far as practicable, maintain present productions of each run and to rehabilitate runs to their maximum potential.

(3) Hatchery salmon and steelhead released to maintain or restore runs above Bonneville Dam shall be shared pursuant to this plan.

(4) A technical advisory committee shall be established to develop and analyze data pertinent to this agreement, including but not limited to the following: calculated run size for all species of fish, ocean catches, escapement goals, catch allocation and adjust-

ments, dam loss, habitat restoration, and hatchery rearing programs. Such a committee shall make recommendations to the managing fishery agencies to assure that the allocating in this agreement are realized. Members shall be qualified fishery scientists familiar with technical management problems on the Columbia River. The committee shall be comprised of representatives named by each of the three states, Oregon, Washington, Idaho, National Marine Fisheries Service, U. S. Fish and Wildlife Service and each of the Indian Tribes.

(5) Each party shall develop a catch record program that utilizes reliable statistical methods and effective enforcement procedures as developed by the committee. Indian tribes shall report on appropriate state forms for each species ceremonial, subsistence and any other catch not sold to state-licensed buyers. The states shall report and make available to all interested parties treaty and nontreaty sport and commercial catch for each species. All the above reports shall be made within an agreed upon time schedule.

(6) The states agree to enact or recommend for enactment by the Pacific Fisheries Management Council appropriate conservation regulations for the ocean fishery that will assure an efficient utilization of stocks and will provide for adequate escapement of mature fish into the Columbia River to achieve the goals and purposes of this plan. Marine regulations should attempt to harvest mature fish and reduce waste.

(7) Fish escapement totals, dam loss estimates, or other technical aspects of this agreement may be modified by mutual agreement to reflect current data. In the event that significant management problems arise from this agreement that cannot be resolved by mutual agreement, the parties agree to submit the issues to federal court for determination. In any event, the Court shall retain jurisdiction over the case of U. S. v. Oregon, Civil 68-513, (D.C. Or).

(8) The sharing formulas as set forth in this plan are controlled upon the premise that the marine area catches in U. S. controlled waters of fish originating above Bonneville Dam, other than fall chinook and coho runs, will be regulated by PFMC so as to be essentially de minimis portions of those runs. The parties acknowledge that if subsequent data should indicate that this premise is incorrect, these formulas may require revision.

(9) Regulations affecting treaty users which are enacted in conformity with this comprehensive plan shall be considered as complying with the court's decrees enunciated in U. S. v. Oregon, Civil No. 68-513, District of Oregon.

(10) Tribal members fishing pursuant to this agreement may employ only members of the Tribes, while exercising their treaty fishing rights.

(11) All fish numbers referred to in this agreement are adult fish.

(12) The sharing formulas contained herein for determining the treaty fishery share refer to those fish caught in the Columbia River below McNary Dam and any other inland off-reservation catch placed in commercial channels.

Except as provided in subparagraph 5 under Spring Chinook, neither treaty nor nontreaty non-commercial harvest in tributaries, or in the mainstem Columbia River above McNary Dam, shall be considered in the sharing formulas contained herein.

(13) Upon thirty days written notice by any party, after five years from date, this comprehensive plan may be withdrawn or may be renegotiated to assure that the terms set forth represent current facts, court decisions, and laws.

Fish Management Plan

A fish management plan has been adopted for those species of importance to assure future conservation of the resource and equitable sharing of the harvest between treaty Indians and nontreaty users. The formulas represent Available Fish for Harvest and may not reflect total catch if fishing effort is inadequate to harvest all available fish. All runs of fish described in this plan are those originating in the area of the Columbia River or its tributaries above Bonneville Dam.

Fall Chinook Salmon

The Columbia River fall chinook shall be managed under the following plan:

(1) Run size shall be determined by the number of fish entering the Columbia River which are destined to pass Bonneville Dam.

(2) Escapement of 100,000 fish above Bonneville Dam shall be subtracted from total in-river run size.

(3) Additional fish above ascapement are available for harvest and shall be shared 60% by treaty fishermen and 40% by nontreaty fishermen.

(4) The states' goal is to manage the fisheries to provide and maintain a minimum average harvestable run size of 200,000 upriver fall chinook to the Columbia River.

(5) The 60% treaty share shall include mainstem ceremonial, subsistence, and commercial harvest as allocated by the Indian tribes. The 40% nontreaty share shall include in-river commercial and sport harvest as allocated by the appropriate agencies.

Spring Chinook

The Columbia River spring chinook shall be managed under the following plan:

(1) Run size shall be determined by the number of fish entering the Columbia River destined to pass Bonneville Dam.

(2) Spawning escapement goals shall be a minimum of 120,000 and 30,000 fish above Bonneville and Lower Granite Dams respectively.

(3) The states' goal is to manage the fisheries to provide and maintain a minimum average run size of 250,000 upriver spring chinook to the Columbia River.

(4) Treaty ceremonial and subsistence catch shall have first priority. The fisheries shall not exceed a catch of 2,000 fish on a run size of less than 100,000 fish; 5,000 on a run size of between 100,000 and 120,000 fish; and 7,500 fish on a run size of between 120,000 fish and 150,000 fish. Treaty ceremonial and subsistence fishing for spring Chinook with gillnets as well as other normal gear may occur, but such gillnet fishing shall be subject to a notification system similar to that presently used for ceremonial fishing. All catches shall be monitored cooperatively for the purpose of ascertaining the amount of the catch.

(5) On a run size of between 120,000 and 150,000 fish passing Bonneville Dam, the nontreaty fisheries are limited to the Snake River system and may harvest fish which are in excess of the 30,000 spawning escapement passing Lower Granite Dam. (Under average river flow conditions, 120,000 fish at Bonneville Dam will generally provide 30,000 fish at Lower Granite Dam and 150,000 fish at Bonneville Dam will generally provide 37,500 fish at Lower Granite Dam.

(6) On a run size of more than 150,000 fish passing Bonneville Dam, all allocations as provided for in items 4 and 5 shall occur. All additional fish

available for harvest below McNary Dam shall be shared 40 percent for treaty fishermen and 60 percent for nontreaty fishermen. If river passage conditions improve so as to provide more than 40,000 fish at Lower Granite Dam on run sizes of 150,000 fish or less, the 40 percent and 60 percent allocation may occur on a run size of less than 150,000 fish at Bonneville Dam.

Summer Chinook Salmon

Summer chinook salmon runs are precariously low and do not warrant any fishery at the present time, with the exception of a treaty subsistence, ceremonial, and incidental catch not to exceed 2,000 fish during the months of June and July.

The parties agree that if the run size increases a formula for sharing of the available harvest above present escapement goals for this race shall be similar to spring chinook.

Summer Steelhead

(1) Run size shall be determined by the number of fish entering the Columbia River destined to pass Bonneville Dam.

(2) The escapement goal to spawning grounds above lower Granite Dam shall be a minimum of 30,000 fish. A run size of 150,000 fish at Bonneville Dam will provide for 30,000 fish at Lower Granite Dam.

(3) The treaty Indian mainstem fishery shall be limited to ceremonial, subsistence and incidental catch to other commercial fisheries. A minimum mesh restriction of 8 inches will be utilized to limit incidental catch.

(4) The Indian tribes recognize the importance of the steelhead stocks to recreational users and agree to forego a target commercial fishery.

Sockeye Salmon

Sockeye salmon runs are precariously low and do not warrant any fishery at the present time, with the exception of a treaty subsistence, ceremonial, and incidental catch not to exceed 2,000 fish.

The parties agree that if the run size increases so as to provide harvestable quantities, such harvest shall be shared equally between treaty and nontreaty fishermen.

The parties recognize the importance of protecting summer chinook and summer steelhead stocks during the harvest of sockeye salmon. Incidental catch of summer chinook and steelhead shall be minimized by providing appropriate restrictions to the sockeye fishery.

Coho Salmon

Coho stock are in the treaty fishing area simultaneously with other species which currently need protection from fishing effort. Parties agree to use their best efforts to develop methods to

maximize coho harvest while protecting those other species.

Shad

Shad runs have been sufficiently large to allow for unlimited harvest. However, because shad fisheries can take stocks of salmon and steelhead that are below harvestable levels, new catch methods shall be pursued particularly by the Indians above Bonneville Dam to assure a sufficient catch of shad while minimizing the catch of other species. If escapement goals and catch formula must be established in the future, the committee shall compile the required data and make recommendations to the managing fisheries agencies.

Sturgeon

The population of sturgeon in the Columbia River appears residual above Bonneville Dam. The parties agree that the Indian tribes shall have a commercial fishery regulated by sound principles of conservation and wise use. A sport harvest may occur simultaneously for sturgeon above Bonneville Dam.

Winter Season

The treaty fishermen shall be allowed a mainstem commercial fishery for any species of fish between February 1, and April 1.

This comprehensive plan for managing anadromous fisheries on stocks originating from the Columbia River and its tributaries above Bonneville Dam is

adopted by the undersigned this 25th day of February, 1977.

/s/ Robert W. Straub
ROBERT W. STRAUB
Governor of Oregon

/s/ Dixy Lee Ray
DIXY LEE RAY
Governor of Washington

CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

/s/ Harold Culpus
HAROLD CULPUS

/s/ Watrum Totum
Watrum Totum
CONFEDERATED TRIBES & BANDS OF THE YAKIMA INDIAN NATION

/s/ Lylia Marthson
LYLIA MARTHSON
CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

/s/ Richard A. Halfmoon
RICHARD A. HALFMOON
CHAIRMAN, NEZ PERCE TRIBE OF IDAHO

/s/ Alta A. Guzman
ALTA A. GUZMAN, SECRETARY
NEZ PERCE TRIBE OF IDAHO

Supreme Court, U. S.
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Nos. 78-119 and 78-139

IN THE

Supreme Court of the United States

October Term, 1978

STATE OF WASHINGTON, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

ON PETITIONS FOR WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT INDIAN TRIBES

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-119

STATE OF WASHINGTON, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT INDIAN TRIBES

The tribes submit a single response to the Petition of the State of Washington (Pet. 78-118) and the Petition of the Puget Sound Gillnetters (Pet. 78-139) both of which seek review of certain enforcement orders affirmed by the Ninth Circuit Court of Appeals in the Washington fisheries dispute as well as certain aspects of the original *United States v. Washington* judgment. The Petitions also seek review of a separate appeal in *United States v. Washington*.

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, concerning the enforcement orders is entitled *Puget Sound Gillnetters Ass'n v. District Court* and is reported at 573 F.2d 1123 (1978). The original decision in *United States v. Washington* is reported at 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), *rehearing denied*, 424 U.S. 978 (1976). The subsequent opinion of the United States Court of Appeals for the Ninth Circuit in *United States v. Washington* is reported at 573 F.2d 1118 (1978).

II.

QUESTIONS PRESENTED[1]

1. Whether the District Court abused its discretion, in implementing prior orders protecting federally reserved treaty fishing rights against massive incursions by state and private interests, by allocating salmon fishing opportunities among treaty and non-treaty fishermen for the 1977 Puget Sound salmon season.

2. Whether the claim that the allocation order so entered offends equal protection, has been resolved by prior litigation or is otherwise meritorious.

3. Whether nonparties engaged in widespread, admitted, and deliberate attempts to frustrate prior orders protecting federally reserved fishing rights may be included within the scope of enforcement orders.

1. Question Number 4 as set forth in the United States Memorandum was not raised by the Petitions and the United States has not raised it by cross-petition; it is therefore not properly before this Court.

4. Whether the Ninth Circuit erred in dismissing as moot appeals from certain 1975 actions of the District Court involving sockeye salmon fisheries.

III.

STATEMENT OF THE CASE

A. Introduction

The Petition for Review by the State of Washington represents yet another effort to overturn or circumvent implementation of several federal Indian treaties. Several non-treaty fishermen's associations, whose members have been represented by the State as *parens patriae* in the proceedings below, have joined in that effort. These petitions collaterally attack *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *affirmed*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), where it was adjudicated that the treaties reserved to Western Washington Indian tribes certain fishing rights. The dispute concerning the meaning of the treaties and the scope of the restrictions they impose on State authority has been before this Court on a number of occasions.[2] Those decisions have determined the parameters of State authority. The issues presented by the instant case are not novel nor do the circumstances surrounding it justify Supreme Court review.

First and foremost, the Supreme Court has already denied review of *United States v. Washington*. 423 U.S. 1086

2. *See United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washington*, 315 U.S. 681 (1942); *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968) (Puyallup I); *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973) (Puyallup II); *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977) (Puyallup III). *See also, Antoine v. Washington*, 424 U.S. 194 (1975) construing similar language in a non-treaty context.

(1976). At that time, of course, the *United States v. Washington* declaratory judgment became final, including the District Court's interpretation of the treaties which the Petitioners seek to re-open here. The latest series of enforcement orders entered by the District Court and affirmed by the Ninth Circuit Court of Appeals, *Puget Sound Gillnetters Ass'n v. United States District Court*, 573 F.2d 1123 (1978), have become necessary only because of the refusal of the State of Washington and certain non-treaty fishermen to comply with the original decision. No new circumstances are presented which would call for an avoidance of ordinary principles of *res judicata*.

Petitioners, in attempting to justify review, rely heavily on an asserted conflict between *United States v. Washington* and the decisions of the Washington State Supreme Court. However, no direct or justiciable conflict exists. The State Supreme Court cases were collusive lawsuits in which the only parties were the State of Washington and the non-treaty fishermen's associations, who, as the Petitions reveal, have an identical interest and desire the same result. Moreover, the District Court has avoided direct conflict with the State court system by removing State control over Indian treaty fishing except as necessary for conservation purposes. Since the State's jurisdiction is now primarily limited to the non-treaty fishermen and to the portion of the harvest allocated to them, the State Supreme Court's interpretation of the treaties has become irrelevant.

Finally, it should be emphasized that far from the state of chaos portrayed in the petitions, the District Court's 1977 orders have brought a large measure of stability to the fishery. In the 1977 season, the tribes harvested close to their treaty share for the first time. Direct confrontation

with the State courts was avoided and a number of contempt citations have been successfully prosecuted against non-treaty fishermen who were violating the Court's orders. A series of such convictions were recently affirmed by the Ninth Circuit Court of Appeals. *See United States v. Olander, et al.*, Nos. 77-3794, 77-3925, 78-1239, 78-1240, 78-1310, 78-1311, 78-1312 (September 7, 1978) (A copy of the decision has been lodged with the Court.) It is to be expected that enforcement for the 1978 season will be even more effective because of the experience gained last season by the federal agencies and because of the deterrent effect of the affirmed convictions.[3]

The United States acquiesces in review although with obvious and well-placed misgiving. The United States' recommendation was made in the twin hopes that a ruling from this Court will enable the State to assume its responsibility to manage the fishery consistent with the Indian treaty fishing rights,[4] and that the fishing rights controversy may be finally resolved.[5] In light of the State's history of recalcitrance with respect to treaty fishing rights, however, these hopes are unlikely to be realized.

Moreover, in attempting to justify Supreme Court review in circumstances where no meritorious issues are presented, the United States has exaggerated both the extent of the District Court's involvement in actual man-

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3. The attorneys for the non-treaty fishermen have argued that the District Court did not have authority to enjoin non-parties and that they were bound by the Court's interpretation of the treaties. Those arguments were repeated in the press and widely circulated, and many fishermen doubtless believed that they would defy the District Court without fear of penalty. The Court of Appeals specifically rejected those arguments.

4. U.S. Memo at 21.

5. *Id.* at 25.

agement of the fishery and the extent to which the State has relinquished such functions. Similarly, the scope of the enforcement problems involved in implementing the decision are magnified by the United States, especially in light of the recent Court of Appeals affirmance of the convictions discussed above. These overstatements undermine the heart of the United States' stated rationale for review. On the other hand, the tribes, while believing review inappropriate, join fully in the United States' discussion of the merits. Some additional comments are needed, however, to give proper perspective to that discussion.

B. Background Of This Litigation

In 1855 and 1856, the United States sent representatives to negotiate treaties with the Indian tribes in order to extinguish Indian title to the region as it had previously done with Spain, Russia and Great Britain. The tribes agreed to bargain and sell their land to the United States, except for small residential reservations. However, they insisted, and the United States agreed, that they would retain their right to fish in their customary locations on and off reservation. Such off-reservation fisheries would be shared "in-common" with the non-treaty inhabitants of the territory. These fishing rights were not "granted to the Indians,"[6] but were *reserved* by them. *United States v. Winans,* 198 U.S. 371, 381 (1905).

Contrary to the State's implication,[7] at the time of the

6. Petition for Writ of Certiorari in *Puget Sound Gillnetters Assoc. et al. v. United States District Court for the Western District of Washington,* Cause No. 78-139 (hereafter cited as "Gillnetters' Pet. Cert.") at 8.

7. ". . . the Indian fishery being primarily for subsistence." Petition for Writ of Certiorari in *State of Washington, et al. v. United States of America, et al.,* Cause No. 78-119; (hereafter cited as "State Pet. Cert.") at 8.

treaties, Indians were trading in fish in substantial volume and supplied most of the fish and shellfish used by the non-Indian settlers. 384 F. Supp. at 343, n. 29, 350-353. The treaty negotiators for the government were aware of Indian commerce in fish and of its contribution to the territorial economy. Treaty Indian commercial fishing is not a new development and the evidence shows clearly that the treaties were not intended to preserve only subsistence fishing. However, the admission of Washington to the Union some forty years later, coupled with the influx of European settlers and the introduction of the canning industry, created a governmental mechanism, the political power, and an economic incentive for the growing non-Indian majority to exclude the Indian tribes from their dominant position in the commercial salmon fishery.

The State's implication[8] that Indian fishermen, prior to the District Court's 1974 decision were afforded equal access to the fishery is false. Indian usual and accustomed fishing grounds are located primarily in terminal areas at the end of the salmon migration routes. After this Court held that the State could not deny Indians access to their usual and accustomed places, *United States v. Winans,* 198 U.S. 371 (1905), the State allowed the exercise of treaty rights to be circumvented by authorizing and encouraging non-treaty harvest of the fish runs before they reached these traditional fishing places. The State justified the taking of the entire harvestable surplus of a fish run in the marine waters prior to the run reaching the usual and accustomed fishing places of most tribes, by arguing that Indian fishing could lawfully be restricted in the name of conservation to assure an adequate escapement of mature

8. State Pet. Cert. at 13.

salmon to reproduce and perpetuate the runs.[9] *United States v. Washington,* Findings of Fact 217-218, 384 F. Supp. at 393.

Eight years ago, faced with a continuing pattern of discrimination against Indian fishermen which even a series of Supreme Court decisions protecting treaty rights in Washington did not deter,[10] the United States and a number of Northwest Indian tribes filed an action against the State of Washington in the Western District of Washington seeking declaratory and injunctive relief. Following several years of pre-trial development of evidence and a lengthy trial, the District Court determined that the State had systematically discriminated against treaty fishermen by practices such as capricious closures, arrests, gear seizures, and physical violence, and restrained the State from interfering further with these federally-guaranteed rights. 384 F. Supp. 312, 399-405, 413-19 (1974). The District Court's rulings, which dealt comprehensively with the issues of tribal self-regulation, allocation of fishing opportunity among treaty and non-treaty fishermen, and the power of the State to restrict off-reservation fishing for conservation purposes, were affirmed in all material respects by the Ninth Circuit. 520 F.2d 676 (1975). Certiorari was denied by this Court on January 26, 1976 upon the recommendation of the United States. 423 U.S. 1086.

Subsequent to the 1974 decision, substantial efforts at implementation of the District Court's orders have been

9. It is to this practice that the Gillnetters allude when they state:
> It was the State of Washington's efforts to conserve the salmon that created the conflict between the State of Washington and the various treaty tribes over the Indians' entitlement to harvest salmon contrary to regulations adopted by the State.

Gillnetters' Pet. Cert. at 8.

10. *See* authorities cited in note 1, *supra.*

undertaken.[11] At the technical level these efforts have been particularly successful. Cooperation between the State and tribal governments[12] is perhaps most crucial in the biological decisions which comprise fisheries management. Fisheries biology is a specialized but inexact science and experts may disagree over such technically complex matters as whether a need for a conservation closure exists. Recognizing this, the District Court from the outset of the continuing jurisdiction phase of *United States v. Washington,* has utilized a Technical Advisor in fisheries biology and has established procedures to resolve technical disputes.

As part of the 1974 ruling, the District Court adopted an Interim Plan, 384 F. Supp. at 420, which requires state and tribal biologists to formulate general principles for fisheries management and to exchange biological data.[13] A refined procedure for resolving technical issues has been implemented through the creation of a Fisheries Advisory Board consisting of a representative of the State, of the affected tribes, and the non-voting Technical Advisor. When agreement is reached on a technical issue the text is reported to the District Court and the matter concluded. When agreement is impossible, the aggrieved party may

11. Congress has appropriated millions of dollars to implement the original decision, a sizeable portion of which has gone to the Bureau of Indian Affairs for the purpose of strengthening the tribes' fisheries management programs. *See e.g.,* House Comm. on Appropriations, Department of Interior and Related Agencies Appropriation Bill, 1976, H.R. Rep. No. 374, 94th Cong., 1st Sess. 32 (1975).

12. The Northwest tribes have established comprehensive programs regulating Indian treaty fishing and have established biological staffs to handle the technical aspects of regulation. These efforts have been sanctioned and encouraged by the District Court. *See* Memorandum Adopting Salmon Management Plan, State Pet. Cert. at A-61.

13. *See also* Order for Program to Implement Interim Plan, R. 718.

invoke the Court's continuing jurisdiction to seek redress, The Fisheries Advisory Board has successfully resolved many of the underlying technical disputes in the salmon, steelhead and herring fisheries.[14]

The District Court has also required the Fisheries Advisory Board to consider long-range solutions to persistent biological problems, and ordered the parties to submit plans for resolution of these matters. These efforts culminated in an agreed-upon Salmon Management Plan adopted by order of the Court, August 31, 1977,[15] which now governs 1978 harvests anticipated in the case area.[16] The Plan covers many of the details of fishery management including methods for agreeing on escapement goals, determining run size estimates, and making "equitable adjustments" when one party or the other is denied an opportunity to harvest its share.

In addition, through the Fisheries Advisory Board the parties succeeded in reaching agreement on most of the technical bases for both the 1977 and 1978 allocation orders. These include such matters as run size estimates, escapement goals, harvestable numbers of fish and projected interceptions of fish by sports fishermen.

Given the above, it is clearly an over-simplification to state that the District Court has taken over day-to-day salmon fishery management. It *is* true that the Court has

14. *See e.g.*, R. 778, 816, 928, and 950.

15. State Pet. Cert. at A-61.

16. Below, the State appealed, in part, from the August 31, 1978 Order, but was content to argue that the plan was part of "the system" objected to. Washington Brief Before the Ninth Circuit, 10-11. We doubt whether the Plan is challenged by the Questions Presented in the State's Petition (at 4-5), but the objection is frivolous for the reason that the State agreed to the Plan before the District Court. (R. 1216, 1232)

established *mechanisms* to settle technical disputes out of court and a procedure to judicially resolve those which cannot be settled. Technical issues are addressed by the court, however, only after they have been refined through the Fisheries Advisory Board process (and only if no agreement has been reached). This is entirely appropriate, of course, and this process has kept most technical disputes out of court. Most of the management decisions, therefore, are made by the State and tribal biologists or by the Fisheries Advisory Board.

It must also be emphasized that this process has not prevented the State from performing its usual management tasks. The State estimates run sizes, escapement goals, and harvestable numbers based on information from its biological personnel in the Departments of Fisheries and Game. It monitors the runs during the season and makes appropriate adjustments to its pre-season estimates. It monitors catches by treaty and non-treaty fishermen and retains authority to close fishing by treaty and non-treaty fishermen when necessary for conservation of the resource. What the Court *has* limited is the State's ability to authorize harvests and enforce regulations without regard to treaty rights. The State's technical fisheries management activities have not been limited.

C. Events Leading To This Appeal

Unfortunately, State cooperation at the technical level has not been mirrored in other areas. The State through its agencies and courts has consistently attempted to circumvent and frustrate the District Court's decision.

> Except for some desegregation cases, . . ., the district court has faced the most concerted official and private

> efforts to frustrate a decree of a federal court witnessed in this century.[17]

Puget Sound Gillnetters v. U. S. District Court, 573 F.2d 1123 (9th Cir. 1978) at 1126.

The State resistance is chronicled by the United States in its brief at 8-18. From the beginning, the State resisted court orders limiting non-treaty fishing, which were designed to prevent mass interceptions of fish by a more mobile, mechanized non-treaty fleet before they reached the terminal usual and accustomed fishing areas. 384 F. Supp. at 384-85. Beginning in 1974, a series of injunctive actions in the state courts initiated by affected user groups resulted in holdings that the Washington Department of Fisheries could only regulate for conservation purposes, could not allocate between treaty and non-treaty fishermen and, therefore, lacked power to implement the federal orders.[18] These rulings then were invoked by the State to justify non-compliance with the federal orders. In the fall of 1974, the District Court was forced to intervene to protect its original decision, upon the recognition that the decision was being undone by a series of state proceedings "hardly resembling contested cases" (R. 671). Consistent refusals to comply by State officials, and reactive federal

17. This recalcitrance was also noted by Judge Burns in his concurrence to the original Ninth Circuit affirmance of the decision:

> The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten.

520 F.2d at 693.

18. The actions, all filed in the Thurston County Superior Court, were denominated *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, No. 50370; *Washington Kelpers Ass'n v. Tollefson*, No. 50552; and *Puget Sound Gillnetters Ass'n v. Tollefson*, No. 50757.

orders to protect the Indian fisheries, ensued in 1975, 1976, and again in 1977.

Implementation was frustrated further by progressively severe illegal fishing by non-treaty fishermen, abetted by official tolerance policies.[19] In 1975, large numbers of non-treaty fishermen fished in violation of state closures and federal court orders.[20] In 1976, the "whole fleet" of purse seiners was observed fishing illegally,[21] and the Puget Sound Gillnetters Association publicly encouraged its members to fish in violation of state closures.[22] This lawlessness was beyond the State's ability to control[23] and endangered the resource, intimidated public officials, and made contempt of the federal court a mark of distinction.[24] During each of these years, widespread violations of the Court's orders by non-treaty fishermen frustrated the exercise of plaintiffs' rights and interfered with defendants' ability to comply.[25]

As the 1977 fishing season opened in Puget Sound, it was clear that protection of the federal treaty rights would not

19. *E.g.*, Findings of Fact and Conclusions of Law Re: Enforcement of 1977 Fisheries Orders, Wash. Pet. Cert. A-79, A-80 to -81.

20. Finding of Fact No. 2, Preliminary Injunction; 1975 Chum Fishing, October 27, 1975; R. 812.

21. Testimony Before the Special Master, Sept. 29, 1976, and to the Fishery Advisory Board on Oct. 11, 1976, as summarized in Tribal Report to Fishery Advisory Board, Nov. 11, 1976, R. 989.

22. Report of Richard Whitney Re: Fisheries Advisory Board, Oct. 11, 13, 1976, Dated Nov. 17, 1976, R. 1003, with attached letter of James M. Johnson, Assistant Attorney General, Oct. 19, 1976, R. 1004.

23. Request for Determination Re: 1976 Chum Run, filed Oct. 28, 1976, by James M. Johnson, Assistant Attorney General, R. 960.

24. See Hearing of Sept. 22, 1977, p. 23. (Testimony reporting the unloading of several tons of illegally caught fish in "a carnival atmosphere, laughing and joking").

25. *See* Findings of Fact and Conclusions of Law Re: Enforcement of 1977 Fisheries Orders, Wash. Pet. Cert. A-83.

be undertaken voluntarily by the State. In June and November, the Washington Supreme Court in two decisions[26] ruled that the Department of Fisheries lacked power to implement the federal orders by allocating the catch between treaty and non-treaty fishermen. In District Court, the Department reaffirmed its policy of non-compliance[27] and on August 28, 1977, nearly 200 non-treaty fishermen were observed fishing illegally in Puget Sound.[28]

The District Court, however, took control of the situation with firmness and restraint. On August 31, with the express consent of counsel for the State,[29] the District Court granted a motion for a Temporary Restraining Order enjoining non-treaty fishermen from taking salmon in violation of the Court's orders and directed federal and state officials to serve copies upon offending fishermen.[30] This was followed, after certain extensions, by the entry, on September 27, 1977, of a Preliminary Injunction Re: Enforcement of 1977 Fisheries,[31] the order which the Court of Appeals affirmed.

The injunction prohibits non-treaty fishermen from fishing in violation of court ordered closures, provides for

26. *Puget Sound Gillnetters Ass'n v. Moos*, 88 Wn.2d 677, 565 P.2d 1151, Petition for Cert. pending No. 77-983; *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 89 Wn.2d 276, 571 P.2d 1373, Petition for Cert. pending, No. 77-983.

27. Testimony of Gordon Sandison, Director, Department of Fisheries, Aug. 8, 1977.

28. Hearing of Sept. 22, 1977, at 72.

29. The order recites that the State Assistant Attorney General had been advised by the Whatcom County Prosecutor that fishing citations would not be prosecuted and that the State was thus requesting the Court "to assume enforcement responsibility for the 1977 fishing season." (*See* Gillnetters' Pet. Cert., App. E.)

30. Gillnetters' Pet. Cert., App. E.

31. *Id.*, App. H.

service by mail upon all State-licensed fishermen, and directs the State to maintain a "hotline" service to inform callers of areas opened to non-treaty fishermen. It was entered, after a hearing, and with notice to the non-treaty fishing groups and their counsel, who chose not to appear or otherwise participate. Accompanying "Findings of Fact and Conclusions of Law" recite that "there have been widespread, open and intentional violations of the Court's orders (and of State regulations enacted to comply with those orders)" by non-treaty fishermen[32] that citations have not been issued by State authorities despite numerous violations,[33] that prosecutors have refused to prosecute,[34] and that the consequence was an interference with the Court's jurisdiction over the harvest opportunity secured to the tribes.[35]

On August 31, 1977, the District Court entered a Memorandum Adopting Salmon Management Plan,[36] not seriously contested here, and a Memorandum Order & Preliminary Injunction.[37] That order states that the Defendant State is unwilling or unable to manage the fishery in conformity with the Court's prior decrees,[38] points out that the State's regulations for the 1977 Puget Sound commercial harvest of several salmon species ignored entirely the earlier rulings,[39] and, on the basis of unanimous recommendations of technical advisors representing the parties, identifies the

32. State Pet. Cert., A-82.

33. *Id.*

34. *Id.*

35. *Id.* at A-83.

36. *Id.* at A-61.

37. *Id.* at A-35.

38. *Id.* at A-36.

39. *Id.* at A-41, 42.

harvestable numbers of fish available within the various management regions.[40] On the basis of uncontested evidence that the in-Sound treaty and non-treaty fisheries had the capability of catching the fish so identified, the order then specified the harvestable number of fish to be made available to the treaty and non-treaty groups.[41] Taking the State at its word that it could do nothing to protect the treaty fisheries, the District Court assumed the power to regulate the treaty share,[42] leaving to the State the only power it asserted—to regulate for purposes of conservation.[43]

Appeals from these various orders, and supplementary ones, were consolidated by the Ninth Circuit with mandamus actions brought by fishing organizations not party

40. *Id.* at A-42, 44.

41. *Id.* at A-44-54. Based on special circumstances existing in the 1977 season, the District Court departed from the allocation formula decreed in the original decision. The Court made it clear, however, that the 1977 Allocation Order was not intended to modify the original decision regarding treaty entitlement.

42. *Id.* at A-54-58.

43. It must be emphasized that each of the enforcement orders entered by the District Court in 1977, was carefully tailored to meet each new State incursion against enforcement. Thus, when the State Supreme Court first opined that State agencies are unable to allocate fish between treaty and non-treaty fishers, the District Court's August 31, 1977 Memorandum Order and Preliminary Injunction lifted the burden of allocation from the State but left other aspects of state jurisdiction unaffected.

When the State advised the Court that it was powerless to regulate non-treaty fishing to protect the treaty opportunity, the District Court entered its September 27, 1977 Preliminary Injunction Re: Enforcement (*id.*, at A-89), which provided for direct court enforcement against non-treaty fishers.

Finally, when Chief Justice Wright of the Washington Supreme Court issued an order requiring the State to open a non-treaty fishery whenever consistent with *state* law (R. 1180), the District Court enjoined the State from promulgating any regulations opening a non-treaty fishery without court permission but provided the State could *close* a fishery when reasonable and necessary for the conservation of the resource. (State Pet. Cert. at A-93) This enabled the Department of Fisheries to continue to carry

to the action. Echoing Judge Burns' prophetic observations made three years earlier,[44] the Ninth Circuit took note of the State's "extraordinary machinations" in resisting the decree, and its efforts to frustrate the court orders. (*Puget Sound Gillnetters Ass'n v. District Court*, 573 F.2d 1123 (9th Cir. 1978) at 1126. Viewing the "pertinent questions" as "not whether the court was right or wrong in 1974," but "whether the court's actions are reasonable now" (*Id.* at 1129), the Ninth Circuit upheld in all particulars the District Court's allocation and enforcement orders. All members of the panel accepted as binding the Court of Appeals 1975 affirmance of the initial decision, differing only over "restatements" of the rationale for the apportionment rule of the earlier decision. (*Id.* at 1129, 1130).

On the same day as the affirmance of the allocation and enforcement orders, a separate panel of the Ninth Circuit dismissed as moot certain 1975 actions of the District Court involving sockeye salmon fisheries. *United States v. Washington*, 573 F.2d 1118 (9th Cir. 1978); State Pet. Cert. A-29. This decision is challenged in the State's petition in No. 78-119.

In summary, the District Court orders as affirmed by the Court of Appeals have had an increasingly stabilizing effect on the fishery and a dampening effect on the efforts of the State and non-treaty fishermen to undermine the treaty fishery. Contempt citations for violating District

out its statutory mandate to conserve the resource and, at the same time, protected the treaty opportunity. It also avoided the direct confrontation with the State Supreme Court that would have occurred had the District Court directly enjoined the State Supreme Court as the United States urged. This restrained but practical approach has been characteristic of the District Court throughout this controversy.

44. *See* note 17, *supra*.

Court orders have been successfully prosecuted and affirmed. The enforcement system utilized by the Court, in other words, is working and can be expected to become more effective.

At the management level, the technical staffs of the State and the tribes have achieved a large measure of cooperation. The District Court has established a mechanism to resolve conflicts out of court and a procedure to judicially resolve those disputes that can't be settled. The State of Washington, contrary to the State's assertion in its Petition at 26, retains substantial authority and performs its usual technical management functions. The picture of chaos and overreaching by the District Court painted by the State and associations in their briefs is completely inaccurate. Given the fact that the District Court's enforcement orders have been made necessary by State resistance to the decision, the Court's orders have been restrained and effective.

There is nothing inherently unworkable about the Court's decision in *United States v. Washington* or in its implementation, a fact illuminated by the situation in Oregon. In Oregon, parallel litigation involving the treaty fishing rights of the Oregon tribes has occurred. *See Sohappy v. Smith*, 302 F. Supp. 899 (D. Ore. 1969) and *United States v. Oregon*, 529 F.2d 570 (9th Cir. 1976). In vivid contrast, however, Oregon has complied with the decisions of the federal courts, acknowledged that it and its non-treaty fishermen are bound by the treaty interpretation, and entered into agreements designed to fully implement the federal court decisions.[45] Oregon joined the

45. *See* "Brief of the Respondent, Yakima Nation, in Opposition" in Cause No. 78-139, at 6-7.

United States and the tribes before the Court of Appeals in supporting the efforts of the District Court to enforce the decision. Oregon's example sets Washington's recalcitrance in proper perspective.

IV.

DISCUSSION

A. There Is No Reviewable Conflict Between The Federal And State Courts

This Court, pending receipt of these petitions, has deferred decision in *State of Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, No. 78-983, which seeks review of two cases decided by the Supreme Court of Washington in which the tribes and the United States participated only as *amici curiae*. The asserted "conflict" between the State Court decisions and the federal court orders does not justify review.

First, assuming, *arguendo*, a conflict in decisions, review of the State cases is precluded because they do not rise to the level of a constitutional "case" or "controversy" within the meaning of Article III of the Constitution. *See generally, Flast v. Cohen*, 392 U.S. 83, 94 *et seq.* (1968). To rise to that level, a controversy must be "actual" and not feigned or contrived. The supposed "controversy" presented by the State cases does not pass this test.

Both State cases are collusive actions brought by commercial fishing interests against the State of Washington for the sole purpose of defeating the federal treaty rights declared in the 1974 decision. As the Ninth Circuit Court of Appeals determined below, the State of Washington, as *parens patriae*, represented the interests of the non-treaty citizens in the federal litigation. Thus, not only are

the State and commercial fishermen in the State litigation not adverse, they are identified in legal interest.

The proceedings before the Washington State Supreme Court were farcical.[46] Both cases were tried upon contrived records which had been agreed upon in advance by the parties. In the briefs and arguments before the Court, the non-treaty fishermen simply reiterated the arguments that the State had made before the federal court. Moreover, as the State's Petition in No. 77-983 quite clearly shows, the State, the party which "lost" below, seeks not a reversal but an affirmance.[47] Lacking "the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process," *United States v. Johnson*, 319 U.S. 302, 305 (1943), these cases do not meet the constitutional requisites of justiciability.

In *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 89 Wn.2d 276, 571 P.2d 1373 (1977), the action initially was dismissed as moot by the Supreme Court of Washington, 87 Wn.2d 417, 553 P.2d

46. In the proceedings the State admitted that it could not fairly present the arguments supporting the federal court decisions, and that these arguments were best made by the tribes and the United States, none of which were parties. As to the legal sufficiency of these arguments, the State left no doubt as to its position:

> And, of course, it must be clearly understood that Fisheries and the undersigned counsel do not believe these arguments to be correct in the law.

See Respondent's Brief to the Washington State Supreme Court, in *Puget Sound Gillnetters Ass'n v. Moos*, Cause No. 45144 and 44401 at 3, 5.

47. Where, as here, "both litigants desire precisely the same result there is no case of controversy within the meaning of Article III." C. Wright, Law of Federal Courts §13, at 40 (3rd ed. 1976), citing *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47 (1971). *See also, Chicago v. Grand Trunk Ry.*, 143 U.S. 339, 343 (1882) (Brewer, J.) (on the risk of courts acting upon an agreed statement of facts); *Lord v. Veazie*, 49 U.S. (8 How.) 251 (1850) (Taney, C.J.).

113 (1976), only to be revived when the State's attorney stressed that perpetuation of the "conflict" between state and federal decisions would enhance the prospects for Supreme Court review. 89 Wn.2d at 277, 571 P.2d 1374; *see also* 87 Wn.2d at 421, 553 P.2d at 116. The cases remain moot; the 1974 salmon fishing season is not only long since past, but the conflict will never arise in the same form again since the District Court orders are now framed on the assumption that the State Department of Fisheries will be unable to regulate other than for conservation purposes.

In sum, the State cases are literally saturated with fundamental defects and grossly inappropriate for appellate review.

Second, setting aside the contrived nature of the State cases, it is clear that no direct conflict between the State Supreme Court and the United States District Court has occurred. The District Court, in its August 31, 1977 order, removed the treaty allocation from State jurisdiction. The Court left the State only with its asserted power over conservation matters, and the State is no longer required to allocate between treaty and non-treaty fishermen. Since the State now exercises no control over the treaty allocation except for conservation, the State Supreme Court's interpretation of the treaties has become irrelevant.

Finally, the Petitions in 78-983 and 78-139 have obscured the fact that Supreme Court review cannot cure the underlying enforcement problems created by the State's asserted[48] state law incapacity to allocate between

48. We, of course, do not agree that state law blocks treaty rights guaranteed under the Supremacy Clause. As Justice Utter observed in his dissenting opinion in *Tollefson:*

> It cannot seriously be argued that the Director of Fisheries lacks

different fishermen. Regardless of the adjudicated meaning of the treaties, the State court presumably will continue to hold that the Department of Fisheries cannot enforce them consistent with State law. Fundamentally, the enforcement problems that do exist are founded on this state law deficiency and not upon any "conflict" in treaty interpretation.

B. Lower Federal Court Decisions Do Not Conflict With Prior Decisions Of This Court

The State of Washington assert that the lower federal court orders in *United States v. Washington* are in conflict with the treaty fishing decisions of this Court because the State's authority to regulate treaty fishing when necessary for conservation has been diluted by orders of the District Court. Nothing could be further from the truth. The District Court in its initial decision[49] and in subsequent orders implementing the decision,[50] recognized that the State may regulate treaty fishing when reasonable and necessary for conservation. The court's resolve to follow the mandate of this Court as stated in *Puyallup I & II* was clearly stated:

> In the opinion of this court, judicial integrity also requires this court to hold that the tribes' contention that the state does not have legal authority to regulate the exercise of their off reservation treaty right fishing must be and hereby is denied by this court. The basis of this ruling is the indisputable and unqualified duty of every federal circuit or trial judge,

power to allocate fish between distinct and competing user groups for purposes of conservation and systematic exploitation of the resource. Such allocation has been the principal effect of Department regulation for many years.

89 Wn.2d at 288, 571 P.2d at 1380.

49. ¶19, Injunction, March 22, 1974, 384 F. Supp. at 417.

50. Preliminary Injunction Order (State Appellant's Appendix, 93, 98.)

> despite academic or personal misgivings, to enforce and apply every principal of law as it is directly stated in a decision of the United States Supreme Court. Recently the United States Supreme Court in *Puyallup-I* and *Puyallup-II* directly and specifically held that Washington has the power to regulate off reservation treaty right fishing in the particulars and to the extent indicated in those decisions, which holding continues in effect unless and until overruled or modified by that court or by Congress. Accordingly, each of the rulings on specific issues in this case stated in Section IV of this decision has been considered and determined on that basis.

United States v. Washington, 384 F. Supp. 312 at 339.[51]

The State attempts by a twisted reading of the District Court's August 31, 1978 Memorandum Order and Preliminary Injunction to suggest that the Court's firm resolve of 1974 has weakened. (State Pet. Cert. at 25.) The August 31 Order *affirms* that the State may regulate when necessary for conservation, and specific procedures are established for such regulation. These procedures would be meaningless if the regulatory power of the State had been removed.[52]

Next the State argues that the District Court's approval of separate fishing times for treaty fishermen somehow discriminates against non-treaty fishermen and contravenes decisions of this Court. (State Pet. Cert. at 24-25) A similar argument was rejected by this Court in *Winans*

51. Both Petitioners quote the District Court's criticism of the *Puyallup* decisions, 384 F. Supp. at 337-338, but fail to point out that the Court specifically held that it was bound by those holdings. (State Pet. Cert. at 25, n. 10; Gillnetters Pet. Cert. at 29-30.)

52. The Court found that the State had utilized its regulatory power in a way that discriminated against treaty fishermen. The prior approval referred to by the Court, State Pet. Cert. at 59, was designed to check abuse. That there was no intention of modifying the original decision is made clear in the District Court's October 17, 1977 Preliminary Injunction Order where the State's authority to close was expressly stated. State Pet. Cert. A-93, 98.

in 1905.[53] It is well established that Indians need not comply with various state laws binding on other fishermen such as licensing requirements, *Tulee v. Washington*, 315 U.S. 681 (1942), nor need they comply with state gear limitations not shown to be necessary for conservation. *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973).

Moreover in *Puyallup III* the Court approved the portion of the lower court order which immunized the treaty fishermen, absent conservation considerations, from state control as to "time, place or method of fishing" up to the amount of the tribal allocation. *Puyallup Tribe v. Department of Game*, 433 U.S. 165, 177-178, n. 18. As the Court of Appeals recognized, in order to allow fish to reach the tribal terminal areas, it is necessary to limit the non-treaty fishery further up the migration path and provide for separate fishing times for treaty fishermen. *Puget Sound Gillnetters v. District Court*, 573 F.2d at 1130.

Finally, the State argues that the District Court's inclusion of hatchery fish in the treaty allocation conflicts with prior decisions of this Court. (State Pet. Cert. at 25-26). First, the State is premature. The District Court reserved ruling on the inclusion or exclusion of hatchery fish, and the issue is therefore not properly before this Court.[54]

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53. In *Winans* this Court was asked to deny the special nature of treaty rights, allow the State the general authority to regulate treaty fishing and provide in treaty fishermen no greater rights than those enjoyed by non-treaty fishermen. To this challenge the Court responded:

> This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.

United States v. Winans, 198 U.S. 371, 380 (1905).

54. The Court's preliminary decision on hatchery fish was entered on August 13, 1976 and was not appealed by the State. Menorandum Decision Granting Preliminary Injunction. At the present time the parties are completing discovery prior to trial of the hatchery issue.

Secondly, this Court has *never* ruled as a matter of law on the hatchery fish question. What this Court *has* said is that hatchery fish may be a factor to be considered in making an allocation. *See Department of Game v. Puyallup Tribe*, 414 U.S. 44, 48-49. In *Puyallup III*, the propriety of the allocation made below was not raised and this Court specifically declined to decide the hatchery issue. 433 U.S. at 177, n. 17. The District Court should be given the opportunity to determine this question before it is appealed.

On the other hand the decisions of the Washington Supreme Court *do* directly contravene *Winans, Tulee* and *Puyallup I, II,* and *III*. *See* the dissenting opinion of Justice Utter of *Washington State Commercial Passenger Fishing Vessels Ass'n v. Tollefson*, 89 Wn.2d 287, 571 P.2d 1379.

C. The District Court Has Not Departed From Accepted And Usual Judicial Proceedings In This Matter

The State and non-treaty fishing groups argue that the District Court has adopted "extraordinary measures" in implementing its decision. (State Pet. Cert. at 26, Gillnetters Pet. Cert. at 32-34). More careful analysis makes it evident that the decisions below present only unimpeachable examples of the power of a federal court to enforce prior decrees. These were resolved correctly and do not support review.

1. *The District Court Did Not Abuse Its Discretion In Fashioning Implementing Orders To Protect Its Prior Decree*

In response to the State's argument that the allocation and management orders were unlawful, the Ninth Circuit upheld the discretionary actions of the District Court, observing:

> The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees . . . The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offer the court no reasonable choice.

Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123, 1126 (9th Cir. 1978).

> The circumstances compelled the court to intervene in fisheries management, and the state does not appear to quarrel seriously with the specific allocations. Indeed, we do not see how, given the state's inability or unwillingness to act, the district court could have protected tribal rights without making orders allocating fish in some manner.

Id. at 1130 (footnote ommitted).

It is beyond reasonable debate that a federal equity court has broad discretion to fashion remedies to correct the systematic invasion of federally-protected rights. *See e.g., Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). "In fashioning a remedy, the District Court had ample authority to go beyond earlier orders and to address each element contributing to the violation," *Hutto v. Finney*, ... U.S. ...., 98 S. Ct. 2565, 2572 (1978), particularly where, as here, the State has not complied with prior mandates. Remedial orders, to be sure, should be responsive to the nature and scope of the encroachment upon the federally-protected rights, fashioned to correct the wrong inflicted, and sensitive to the interests of state authorities to manage their own affairs consistently with the constitution. *Milliken v. Bradley, supra*, at 280-281 (1977). But the choices of trial courts, reflecting a more intimate understanding at the

degree of wrong and the pattern of non-compliance, are accorded great weight by appellate courts. *See e.g., Mills v. Gautreaux*, 425 U.S. 284, 297-98 (1976).

So tested, the District Court orders affirmed by the Ninth Circuit easily pass muster.[55]

The State's allegation that the District Court has "taken control" of fisheries management in the August 31, 1977 Allocation Order (State Pet. Cert., p. 28) neglects to point out that the Court asserted authority only to the extent the State disavowed it in its campaign to defeat prior orders.[56]

The characterization of the August 31 order as an "allocation" not contemplated by the 1974 decision (State Pet. Cert. at 14-16) is disingenuous. In the 1975 appeals to the Ninth Circuit, the State inself urged that an "appropriate" allocation for salmon was one-third (sports), one-third (non-treaty commercial), and one-third (treaty).[57]

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55. In the face of steadfast non-compliance, the Memorandum Order and Preliminary Injunction of August 31, 1977 (the Allocation Order) is admirably constrained. It was designed to protect the fishing opportunity as defined in the original decision and to rectify the consequence of State non-compliance upon tribal fishing opportunities. It addressed, with great care, the root of the problem: State inability to manage the fishery consistent with federal law. The Court of Appeals recognized that the Allocation Order represented the least intrusive remedy available, short of abandoning enforcement altogether. *Puget Sound Gillnetters v. United States District Court*, 573 F.2d at 1130 (9th Cir. 1978).

56. As noted above, the major management decisions relating to run size, escapement needs, and management periods continue to be made by the State.

57. Brief of Appellants Dep't. of Fisheries and State of Washington, Nos. 77-2439, 74-2440, 9th Cir., Sept. 11, 1974, p. 49, *see also*, pp. 50-52. The Washington Supreme Court, ironically, has approved an "allocation," *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976), and this action was upheld by this Court. *Puyallup Tribe, Inc. v. Department of Game* (Puyallup III), 433 U.S. 165 (1977).

2. *Non-parties Who Engage In Admitted, Widespread And Deliberate Attempts To Frustrate Prior Orders Protecting Federally-Reserved Fishing Rights May Be Included Within The Scope Of The District Court's Enforcement Orders*

Petitioners argue that injunctive action by a district court against persons not party to the case is so serious as to merit review by this Court. (State Pet. Cert. at 26, Gillnetters Pet. Cert. in 77-119 at 4.) However, the District Court's enforcement orders against violations by the non-treaty fishermen were undertaken at invitation of the State,[58] with extreme procedural care,[59] and against a backdrop of lawlessness rarely confronted.[60] The Ninth Circuit Court of Appeals sustained the non-party features of the District Court's orders on the ground that the fishermen "are bound because they are in privity with the state, which

58. See note 29 and accompanying text, *supra*.

59. The Gillnetters' attempt to manufacture a notice issue in its petition (Pet. Cert. at 4-5, 9) is spurious. Counsel for the non-treaty groups have been on the service list and have participated as *amici* in the implementation phases of the decision for several years. All of the temporary orders, which of course are not reviewable here, were served with supporting documents in the ordinary course upon attorneys for the non-treaty groups. The Preliminary Injunction of September 27 was preceded by two hearings (one, on September 22, before the Magistrate, another, on September 27, before the court), both with full notice and opportunity to be heard. The September 27 order provides for personal service on all licensed fishermen, sets up a "hot line" telephone service to communicate information on open and closed areas, and makes clear that citations are to be issued only to fishermen with actual notice. (Gillnetters' Pet. Cert., App. H) Obviously, individual claims of inadequate notice, if any there be, can be litigated in individual contempt proceedings not before this Court. *See United States v. Olander, et al., supra.*

The further suggestion (Gillnetters' Pet. Cert. at 10) that the non-treaty groups have been unfairly excluded from proceedings before the District Court is unwarranted. One of the groups, the Washington Reef Net Owners Association, has been a party throughout. Another, the Puget Sound Gillnetters Association, has never requested intervention. A third, the Purse Seine Vessel Owners Association, was denied intervention shortly after the initial decision in 1974, and did not pursue an appeal. At argument before the Ninth Circuit, counsel for the Gillnetters made it clear that they had not intervened for fear that they might be held bound.

60. *Puget Sound Gillnetters Ass'n. v. United States District Court*, 573 F.2d at 1126.

is a party," without ruling on other theories supporting the same result (573 F.2d at 1132, State Pet. Cert. A-18).

The adjudications of the State's *parens patriae* interest in the fisheries resource are, quite clearly, binding upon the citizens of the state, *City of Tacoma v. Taxpayers*, 357 U.S. 320 (1958), a proposition illustrated by a series of water rights cases. *Arizona v. California*, 373 U.S. 546 (1963), decree entered, 376 U.S. 340 (1964); *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935); *Wyoming v. Colorado*, 286 U.S. 494, 506-09 (1932); *see New Jersey v. New York*, 345 U.S. 369, 372-73 (1953) (per curiam).[61] The interests of the State and the non-treaty fishermen are identical, and there is no doubt the latter would have benefitted if the initial decision had gone against the tribes. *See Blonder-Tongue Labs, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

D. "International Fisheries" Case

The IPSFC issues raised by the State (State Pet. Cert. at 5, 28-35) are moot and are otherwise insubstantial for all the reasons set out by the United States in its Memorandum at 16-18 and 25-27.

61. Additionally, alternative grounds supporting the judgment below are set forth in detail in the United States Response to the Writs of Prohibition or Mandamus before the Ninth Circuit, Cause Nos. 77-3129, 77-3208, 77-3209. Briefly, the District Court's orders against the non-treaty fishermen are also sustainable on the grounds that the court was protecting its jurisdiction over the subject matter of the controversy, that the non-treaty fishermen were acting in "active concert or participation" with state officials party to the adjudication, Fed. R. Civ. P. 65(d), or as obstructors of state and federal officials attempting to comply with the original and subsequent implementing decrees. *See e.g., Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168 (1973); *Bullock v. United States*, 265 F.2d 683 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959); *United States v. Hall*, 472 F.2d 261 (5th Cir. 1972); *Kasper v. Brittain*, 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977); *United States v. Dean Rubber Mfg. Co.*, 71 F. Supp. 96 (W.D. Mo. 1946).

E. Additional Allegations By The State Of Washington And By Petitioners In No. 77-139 Do Not Merit Review

Both the State of Washington and the non-treaty fishing groups have mentioned several other purported reasons for granting review of this case. From this unfocussed spectrum of assertions, we will comment briefly on two.

1. *Equal Protection.* The State claims that the allocation orders constitute violations of the constitutional guarantee of equal protection and the prohibition against granting special privileges and immunities. State Pet. Cert. at 5. This contention is unsupported by argument and frivolous. This warmed-over version of the argument that the "in common with" language of the treaties reserved to the tribes no different fishing rights than those enjoyed by other citizens was flatly rejected more than 70 years ago in *United States v. Winans,* 198 U.S. 371, 380 (1905). *See also Tulee v. Washington,* 315 U.S. 681 (1942); *Antoine v. Washington,* 420 U.S. 194, 206 (1975).[62]

2. *The Federal Court's Decision is not Endangering the Resource nor an Industry.* The non-treaty fishing groups baldly assert that the federal court decisions in this matter are "destroying an industry and a resource". Gillnetters' Pet. Cert. at 24. There is no support for this contention in the record nor in fact. This and other unfounded assertions are sprinkled throughout the petition of the non-treaty fishing groups. Unfortunately, the representations and assertions of the non-treaty fishing groups and their counsel are simply not credible.[63]

62. And, of course, the equal protection argument has been specifically rejected by the Court on at least three occasions even where treaty guarantees are not involved but the recognition of Indian rights is based on the special relationship of the United States with Indian people. *United States v. Antelope,* 430 U.S. 641 (1977); *Fisher v. District Court,* 424 U.S. 383, 391 (1976) (*per curiam*); *Morton v. Mancari,* 417 U.S. 535, 551-55 (1974). *See also Forge v. Minnesota,* 262 N.W.2d 341 (Minn. 1977), *appeal dismissed for want of a substantial federal question,* .. U.S. .., 55 L. Ed. 2d 512 (1978).

63. In *United States v. Olander, supra,* in upholding the contempt convictions of six non-treaty fishermen, the Ninth Circuit Court of Appeals characterized their arguments and the arguments of their counsel as ". . . too far fetched to warrant serious consideration." Slip Opinion at 6; bordering ". . . on the frivolous" (*id.*.; ". . . a bit of pettifoggery." (*id.*); ". . . fallacious" (*id.* at 7); ". . . so obviously lacking in merit as not to warrant further consideration." (*id.* at 9); ". . . somewhat offensive." (*id.* at 12); ". . . plainly insufficient." (*id.* at 17); ". . . frivolous." (*id.*); ". . . monkey business." (*id.* at 20); ". . . patently without merit" (*id.* at 21); and ". . . nonsense." (*id.* at 22). Additionally, the Court of Appeals noted that "[a]pparently, counsel does not hesitate to have his clients swear to things he does not and cannot know." (*id.* at 20).

F. Review Of The Treaty Interpretation And Of Other Issues Is Barred By The Doctrine Of Res Judicata

These petitions are bald attempts to relitigate matters put to rest in *United States v. Washington,* 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976), and ought to be denied. The State of Washington has litigated and lost the issues of the meaning of the "in common with" language of the treaties, the scope of the treaty entitlement to fish, the necessity for an allocation and its content, the reach of tribal jurisdiction, and the state power to regulate for conservation purposes, all of which are sought to be reargued again in the undisciplined petitions filed here. State Pet. Cert. 4-5, Questions Presented 1, 2, 3, 4, 7; Gillnetters' Pet. Cert. 4-5, Issues 1, 3, 5.

In our view, review of these issues at this point so directly contravenes established principles of *res judicata* that in order to grant review the Court would need to reexamine its decisions concerning *res judicata* as well.

In *Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591 (1948), the Court described the policies which underlie the doctrine of *res judicata* as follows:

The general rule of *res judicata* . . . rests upon con-

> siderations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment of the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose'. *Cromwell v. County of Sac,* 94 U.S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatsoever, absent fraud or some other factor invalidating the judgment.

333 U.S. at 597.

The United States argues that *res judicata* is not a bar to review of these already-litigated issues citing *Mercer v. Theriot,* 377 U.S. 152 (1964) and *Reece v. Georgia,* 350 U.S. 85 (1955). United States Memorandum at 22, n. 16. These cases are not persuasive with respect to the present reviewability of the District Court's 1974 decision, however, because none of them involved final judgments. In *Mercer v. Theriot,* although certiorari had been denied upon an earlier appeal, the decision did not become final for purposes of *res judicata* since the Court of Appeals had originally remanded the case to the District Court for further proceedings and a possible new trial. 377 U.S. at 153. The original cause of action was still alive, therefore, when this Court later granted review. Similarly, in *Reece v. Georgia,* the Supreme Court of Georgia had originally remanded the case for a new trial after reversing appellant's conviction. 350 U.S. at 86-87. The case was not "final". *See also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251 (1916) where this Court in allowing reopening of issues in a similar context, specifically referred to the original order

for which certiorari was denied as "not a final one" and "interlocutory." 240 U.S. at 258.

In contrast, the District Court's 1974 decision became final upon the original 1976 denial of certiorari since the Court of Appeals affirmed the decision in full. A remand was ordered, but only for the exercise of the Court's continuing jurisdiction. The declaratory judgment phase of the case was completed.

With respect to the United States' recommendation, we fail to understand how the United States has been persuaded to acquiesce in the principle that a state by steadfast resistance to the implementation of federal rights earns the privilege of reopening previously litigated issues before the Supreme Court. The United States' position suggests to us that it believes that there is a certain threshhold level of illegality, which, when exceeded, justifies modification of ordinary principles of judicial finality. The United States' position is particularly troubling in light of its forthright and manifestly correct assertion that the State courts improperly refused to give *res judicata* effect to the judgment of the federal courts. *See* United States Memorandum at 23-24. Surely it is inconsistent in principle for the United States to take the position that this Court should likewise ignore the principle of *res judicata.*

This Court should refuse this invitation to sanction such massive State resistance to federal rights. To adopt the United States, argument simply invites collateral attack[64] on valid judgments by recalcitrant parties.[65]

---

64. Judicial review at this stage is also contrary in principle to the familiar collateral bar rule which restricts severely opportunities to challenge the underlying court order by those who choose to violate it first. *Walker v. City of Birmingham,* 388 U.S. 307 (1967); *see Maness v. Meyers,* 419 U.S. 499, 459 (1975).

65. Neither the United States nor the Petitioners have discussed what impact review of the decisions will have on Oregon and its citizens. As noted above, Oregon has complied with and enforced the Oregon decisions. Clearly, to capitulate to Washington's lawlessness will completely

V.
CONCLUSION

None of the points in the Petitions for Writs of Certiorari merit granting the writs. In its Memorandum, the United States agrees that there is no substance to any of the arguments raised by Petitioners and that the State Supreme Court decisions are violative of *res judicata*, unprincipled, and unsuitable vehicles for review because of the absence of any factual record. Nevertheless, the United States supports review. In so doing, it appears to rely on the following assertions and reasoning:

> (1) Because of the State refusal to comply with the decision, a breakdown in enforcement has occurred with the result that the resource is endangered.
>
> (2) The State has been removed from its usual management functions and the District Court has been forced to assume major responsibility for managing the resource.
>
> (3) The United States has been forced to concentrate a disproportionate amount of enforcement effort on the Washington fisheries with the result that United States resources have been diverted from other (evidently more important) "regular duties".

Only Supreme Court review, opines the United States, will solve all these "problems". *See* United States Memorandum at 19-21.

These largely political arguments are pale justifications for review.

As noted in the Statement of the Case, *supra*, not only has the United States exaggerated the extent of the enforcement problems, but, with the recent affirmance of the contempt convictions by the Court of Appeals, enforcement should become considerably easier and more effective.

unsettle what is now a relatively stable situation. In the event of review, at least one of the parties to the Oregon litigation believes that Oregon will be forced to attempt to collaterally attack the decision here. *See* "Brief of Respondent, Yakima Nation, in Opposition" in Cause No. 78-139 at 10. Neither Petitioners nor the United States have set forth any reasons sufficient to justify imposition of these consequences on a state which has honored declared federal rights.

As to the management problems, the State still performs its technical management functions such as monitoring the runs and retains its jurisdiction to conserve the resource even as against Indian treaty fishing. The District Court has *not* taken over the day-to-day management of the runs but has only established mechanisms to resolve technical disputes when they arise. The State and tribal biologists still have primary responsibility to manage the resource.

As to the last point, it is the responsibility of the United States to enforce the treaties no less than other domestic federal law. Until now we were unaware that enforcement of rights guaranteed under the supremacy clause were not "regular duties" of federal personnel.

In the absence of any legitimate legal issues deserving review, certiorari should be denied. However, if certiorari is granted, we suggest that summary reversal of the State Supreme Court cases and summary affirmance of the Court of Appeals decisions would be appropriate because of the lack of any legitimate controversy.

Respectfully submitted this 27th day of September, 1978.

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FOR ARGUMENT

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-119

STATE OF WASHINGTON, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

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BRIEF OF RESPONDENT, YAKIMA NATION

JURISDICTION

Petitioners invoke jurisdiction of this Court pursuant to 28 USC §1254(1) and 28 USC §1257(3). Petitioners did not supply the time factor upon which jurisdiction rests. 28 USC §2101(c) provides the applicable time factor of ninety days. Petitions for certiorari in 78-119 and 78-139 seek review of the decision

of the Court of Appeals for the Ninth Circuit in *United States v. Washington*, 573 F.2d 1123 (filed April 24, 1978). Petition in 78-119 was filed with this Court on July 21, 1978 (88 days after entry of the Circuit Court's decision) and is timely. Petition in 78-139 was filed with this Court on July 26, 1978, (93 days after entry of the Circuit Court's decision) and appears *not* to have been timely filed. Rule 34. (Respondent's filing dates from 47 L. W. 3156).

Both petitions seek to review the decision of the Court of Appeals for the Ninth Circuit in *United States v. Washington*, 520 F.2d 676, filed on June 4, 1975. Petitions 78-119 and 78-139 were filed with this Court over three years after the entry of the Circuit Court's decision on June 4, 1975. Petitions to review this decision were not timely filed.

STATUTORY PROVISIONS

In addition to the other statutes called to this Court's attention, we set forth:

28 USC §2101(c)

> Any other appeal or writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

QUESTIONS PRESENTED

The Yakima Nation adopts the questions presented by other tribal respondents, as limited by the petitions herein, as the questions presented for review with the indicated additions. The Yakima Nation's brief is supplemental to the brief of the other tribal respondents and is submitted because of the novel findings regarding the Yakima Nation in the District Court and that court's determination of Yakima's tribal self-regulation. This brief is also submitted to raise the issues of collateral estoppel or the law of the case as between Washington and the Yakima Nation as that both are parties to parallel litigation involving the same material issues presented for review.

The additional questions presented are:

1. Is the District Court's determination of the treaty reserved fishing rights of the Yakima Nation and other Indian tribes, which was affirmed by the decision of the Court of Appeals for the Ninth Circuit on June 4, 1975, subject to review herein? Are these June 4, 1975 determinations: (a) the law of the case; (b) Res judicata, or (c) not subject to review as petition for review was not timely filed.

2. Is petitioner Washington, collaterally estopped from raising material issues regarding the Yakima Nation, when those same material isues have been

finally determined by a Circuit Court of Appeals for the Ninth Circuit in parallel litigation between the Yakima Nation and Washington?

STATEMENT OF THE CASE

Petitioner-Washington's Opening Brief, presents this Court with material upon which this Court cannot properly rely and presents Respondents with a task that unfairly burdens their duty to this Court. Rule 40(1)(e) of the Revised Rules of this Court clearly provides that there shall be:

> "A concise statement of the case containing all that is material to the consideration of the question presented, with appropriate references to the appendix, e.g. (A. 12) or to the record, e.g. (R. 12)"

This Court's requirements as to appendix and record references is emphasized by Rule 40(2). This rule provides that every reference to the appendix or the record in any part of the brief "must be accompanied by the appropriate page number", and if to an exhibit, both by the page number "at which the exhibit appears and which it was offered in evidence . . . e.g. (P1. Ex. 14, R. 199, 2134)." The bulk of Washington's Statement of the Case contains statements outside the record. In addition, many statements are referenced improperly under this Court's rules. If the clarity of this Court's rules does not make Washington's performance inexcusable, the depth of experience of the Attorney General before this Court should. Respondent-Confederated Tribes and Bands of the Yakima Indian Nation hereinafter called "Yakima Nation", in its Statement of the Case will ignore Washington's statements outside the record and not properly referenced. The Yakima Nation petitions this Court to strike or ignore portions of Washington's Statement of the Case not in compliance with the requirements of this Court's rules.

Likewise, Washington's Statement of the Case is not a concise or fair Statement of the Case. This will be readily seen when this Court compares the assertions contained in Washington's statement with the referenced source where appropriate references are made. Washington overstates or incorrectly states the record below.

Further, Washington's Statement of the Case is incomplete as regards Respondent - Yakima Nation. In supplying these material facts, it is to be noted that much of the Yakima Nation's Statement of the Case is based on the findings of fact below. These findings of fact are uncontroverted. (A.154,FF. 149).

The Yakima Nation was formed out of the fourteen tribes and bands that were parties to the *Treaty with the Yakimas*. It is a recognized, currently functioning Indian tribe and maintains a tribal government on the Yakima Indian Reservation. At the time of the origi-

nal trial, the Yakima Nation had 6,040 enrolled members, enrolled pursuant to an Act of Congress. (A.155,-FF. 150).

At the time the *Treaty with the Yakimas* was negotiated in 1855, the United States promised and the Indians understood, that the Yakimas would forever be able to continue the same off-reservation fishing practices as to *time, place, method, species* and *extent* as they had or were exercising. (A.157,FF. 156).

The Yakimas at the time of the treaty lived in a food gathering culture. They existed on game, fish, roots, berries, and some cultivated vegetables. Of these foods, fish was a major part of their diet and they landed salmon, steelhead, trout, mussels, eel and other miscellaneous fish. Salmon, both fresh and cured, was a staple in the food supply of the Yakimas. Their diet required a large variety in the kind of salmon and fish caught. The Yakimas consumed large quantities of fish and traded in fish not consumed. (A.155,FF.151; A.156,FF.154). At treaty times the Yakimas made landings at fisheries located in the Puget Sound area. These fisheries in the area of this case's inquiry included the waters of the Snoqualmie, Snohomish, Green, Puyallup, Nisqually, Stuck, Duwamish, White, Carbon, Black Rivers and their tributaries. (A.156, 147,FF.-154). The methods used by the Yakimas to catch salmon and steelhead were very efficient. The Yakimas

used traps, weirs, nets, gillnets, baskets, and seines to land salmon and steelhead. (A.156FF.152).

In contrast, at treaty time and for a period thereafter, a non-Indian marine fishery did not exist and non-Indian fishing was minimal. This non-Indian fishing posed no threat to the abundance of fish resources being harvested by Indian fishermen (A. 102-103, FF. 8).

In post-treaty times, the Yakimas continued to fish as they had. During territorial times, officials of the United States and the Washington Territory supported the Yakima Nation's right to enjoy the off-reservation fisheries as the Yakimas had prior to the execution of the treaty. (A. 157-158, FF.157). However, Indian off-reservation fisheries have not been supported by state officials. In 1966, the State of Washington commenced multiple arrests of Yakima Indians which caused them to decrease their fishing effort in the Puget Sound area. The Yakima Nation has been embroiled in extensive litigation concerning fishing areas outside this case area as a result of the State's concerted efforts of arrest and harrassment. The Yakima Nation has been successful in such litigation, but the time and money expended has required the Yakima Nation to limit the fishing efforts of its Puget Sound fishermen. (A158, FF. 158).

The Yakima Nation has always regulated its fisher-

men for conservation purposes. (A.158, FF.159). The Yakimas continue as a religious rite not only the first salmon ceremony, but the basic underlying salmon culture. This salmon culture is based on a religious concept of interdependence and relatedness of all living things. This concept was and is a dominant feature of the Yakimas' lifestyle. The Yakima Indians are tenacious in adhering to these past customs and traditions. (A.157, 159; FF. 157), 162). The Yakimas have adopted and effectively enforced tribal fishing regulations which in some material respects are more restrictive than Washington's regulations (A.86).

In contrast, non-Indian salmon fishing in the Puget Sound area was unregulated until 1890. It was 1915 before the first state fisheries code was written, passed and signed into law. (EX. JX-2A. Table 25, Section 2.3.1). It was not until 1925, that the State of Washington commenced regulating landings of steelhead as a game fish. With minor exception, state regulation did not provide for Indian treaty fishing. (EX. JX-2A, Section 2.3.2). Beyond a daily sports limit, the State of Washington did not limit the landings of salmon in off-shore marine waters where the bulk of non-Indian landings are made. (A.167, FF185). In contrast to the Yakima Nation lifestyle, the non-Indian lifestyle has caused severe limitation and reduction of the salmon resource because of watershed alteration, water storage

projects, industrial development, channel alteration and residential development. (EX. JX-2A §1.5.1, §1.5.2, §1.5.3, §1.5.4, §1.5.5).

The Yakima Indians continue to live close to the poverty level and have not reached economic or social parity with non-Indian citizens of the State of Washington. The Yakima Indians continue to be very dependent upon anadromous fish to sustain their way of life. Large numbers of the Yakima Nation follow this pursuit for subsistence and livelihood. (A.106,FF 163).

In the initial decision, the District Court held and the Circuit Court affirmed, that the Yakima Nation and the Quinault Tribe qualified for self-regulation, free from any state regulation. (A43, 48). As a part of a general scheme to provide Indian fishermen with their treaty share, the District Court held, and the Circuit Court affirmed, that Washington must manage its non-Indian fisheries so as to permit a harvest by Indian treaty fishermen and a necessary escapement to perpetuate species and runs. (A. 49, 52). The District Court, which retained jurisdiction, anticipated that Washington, who promised to abide by the Court's necessary determined allocation, (R66, 83, 84), would make significant reductions in the non-Indian fishery in compliance with the objectives of the judgment. These objectives were affirmed by the Circuit Court and this Court denied certiorari. (Petition A-2, A428). The

District Court in anticipating compliance was unfortunately incorrect. Enforcement became a problem. Enforcement is a problem because Washington, its courts, and the non-Indian fishermen have never fully accepted the principal that treaty rights can be claimed by a politically impotent minority. Before 1977, the State enforced the District Court's order grudgingly at best. The orders from which Washington appeals is a result of a break down in State law enforcement in 1977. In 1977, the State agencies had, with well publicized reluctance, issued fishing regulations, which, if enforced, would have met minimal requirements of the District Court's judgment as affirmed. In the few instances where Washington cited non-Indian fishermen, the applicable law enforcement authorities refused to prosecute violations of the regulations. More importantly, the Washington Supreme Court attempted to strip the Washington regulatory agencies of their power to comply with the judgment of the federal courts. With this support, Washington's regulatory authorities witthdrew its regulations and issued new ones which made no attempt to protect Indian treaty rights in the fishery. This situation led the District Court to cease its attempts to work through Washington's regulatory agencies and, instead, to directly undertake enforcement of its decree. (Washington's Petition A-10).

The Yakima Nation has been engaged in parallel litigation with Petitioner-Washington regarding off-reservation treaty rights on the Columbia River. In 1969, the District Court for the District of Oregon in *Sohappy vs. Smith; United States vs. Oregon*, 302 F. Supp. 899, determined that the State of Oregon could not regulate treaty fishing unless certain conditions were met. The District Court further determined that certain treaty Indians, including the Yakima Indians, have an absolute right to their off-reservation fishery, and are entitled to a fair share of the fish produced by the Columbia River system. No appeal was taken from that decision.

In 1974, under the District Court for the District of Oregon's retained jurisdiction, Washington was permitted to intervene as a party in the Columbia River case and moved to enjoin treaty fishing until permitted by the regulations of the States of Oregon and Washington. Washington, as a condition of intervention, agreed to be bound by the 1969 decision. Injunctive relief was denied. The District Court for the District of Oregon, as a clarification of a "fair share" of the fish in the 1969 judgment amended the 1969 judgment to provide that the Indian treaty fishermen were entitled to a 50% share. Washington appealed the denial of the injuction, the amendment of the initial judgment and attempted to appeal the 1969 judgment. The Circuit

Court dismissed the appeal regarding both the denial of injunction and the attack on the 1969 judgment and affirmed the District Court of Oregon's 50% allocation amendment of the 1969 judgment. No further review was sought by the parties. *Sohappy vs. Smith; United States vs. Oregon and Washington*, 529 F.2d 570 (1976).

Thereafter, in 1977, the States of Oregon and Washington, the United States and the Columbia River treaty tribes (including the Yakima Nation) reached an agreement concerning allocation of fish runs on the Columbia River, and this agreement was incorporated into a decree on February 8, 1977, by the District Court for the District of Oregon. Shortly thereafter in 1977, Washington's fish management agencies and judiciary claimed that Washington had no authority to agree to the plan and contended that Washington could not fulfill its obligation under the Washington approved plan and decree and regulate non-Indian fishermen on the Columbia River. Pursuant to requests by the United States, Oregon, and the treaty tribes, the District Court of the District of Oregon enforced the decree by restraint against non-Indian violators. Washington was a party to these proceedings and the subsequent appeal. The Circuit Court, in the same decision now under review by Washington's petition, affirmed the District Court of Oregon's authority to enforce its decree by re-

straint of non-Indian violators of the plan and decree. *Columbia River Fishermen's Protective Union, Inc. et al. vs. United States District Court for the District of Oregon*, 573 F.2d 1123 (1978). (Washington's Petition A1). Washington and the Yakima Nation were parties in these cases involving authority of a District Court to enforce its orders over non-parties to the decree in the consolidated appeal involving both the Columbia River and the Puget Sound fishing areas in the two district courts and the Court of Appeals. Washington has obtained review contesting the authority of the District Court for the Western District of Washington to enforce its decree in this pending petition, but has not requested review of the authority of the District Court of Oregon to exercise the same authority in the Columbia River area. The State of Oregon supported the District Court action.

SUMMARY OF ARGUMENT

The affirmed 1974 judgment of the United States District Court for the Western District of Washington determining the extent of reserved treaty fishing rights in the Puget Sound area and allocating Indian and non-Indian shares is the law of the case.

Washington is collaterally estopped from raising material issues regarding allocated shares and enforcement powers as these issues have been finally deter-

mined in parallel litigation between Washington and the Yakima Nation.

This Court has provided that treaties should be interpreted as the Indians understood them, not according to technical rules. The District Court's interpretation conforms with this rule and is supported by the record.

The percentage allocation method, suggested by Washington and adopted by the District Court, does not prejudice the non-Indian fishermen and is within the power of the lower courts.

Necessary supplemental enforcement orders to protect the treaty allocation are the duty of the federal courts. The District Court orders are a reasonable action in furtherance of that duty.

Treaty rights and their preservation are a federal purpose under the *Constitution* and not within the powers of a state.

Washington, and its allies, by past action, have forfeited any right to equitable relief. Washington should not be considered as the primary management agency.

ARGUMENT

1. Introduction

The recalcitrance and extra ordinary machinations of Washington and the concerted official and private efforts to frustrate a decree of a federal court have been duly noted by the Circuit Court below. (Washington's Petition A3, 9). This Court will undoubtedly wish to comment on these *acts of nullification.*[1] The Yakima Nation is concerned about these concerted attempts to frustrate the national purpose. The Yakima Nation is similarly concerned about the jeopardy to the resource caused by the unregulated non-Indian fishing on diminishing runs which Washington decries but approves in its submission to this Court. Washington's approval can only find precedent in the regulation of the non-Indians harvest. This management scheme is beyond the Yakima Nation's comprehension. Let us assume that one had a herd of cattle from which the young would go from the home ranch to free range and return to the home ranch fully mature in a few years for cropping and reproduction. Let us further assume that certain species in the herd required limited cropping to save the returning mature members of that species for reproduction. On these premises, a person who would believe that the preferred method of harvest would be to go out on the range and crop the herd by a method which cannot select as to maturity or species, would be considered horticulturally improvident. However, Washington fosters a system of off-shore and

[1] Washington and its allies present actions are so similar to the actions of the Southern States in the first half of the Nineteenth Century; that "nullification" is clearly the word to be used. See: Hendrick, *Bulwark of the Republic,* "The Rise and Fall of Nullification", pp. 191-258. At this early time, "nullification" was defined as "anarchy reduced to a system." (supra, p. 255). We adopt that definition.

marine harvest on mixed species stocks containing commingled immature and mature members of inadequate and diminished species rather than a system harvesting only returning mature members in freshwater by methods that can protect species needing additional enhancement.[2] These non-Indian management decisions are made necessary by political judgments as to who can share in the non-Indian allocation. Political judgments call for decisions that are contrary to the laws of the Creator protecting the resource which have been followed by the Yakimas from time immemorial. The Yakima Nation believes these rules based on the nature of the resource would best protect the resource created for the indigenous inhabitants of this land. However, in a political world (domestic and international), the Yakima Nation and this Court have to accept (but not necessarily respect) political decisions legally made. However, the Yakima Nation petitions that this Court recognize that most of Washington's management decisions are primarily political and ignore conservation or preservation.

Given the existence of a reserved treaty right, it is obvious that percentage allocation is a necessary tool for protecting reserved rights and perpetuating runs. No other method, as one of the attorney's for the State

[2] This system of harvest is seen as even more improvident during these years when energy conservation is an announced national purpose.

of Washington stated in his opening remarks at the original trial (R. 83), will allow justice to be done, permit harvests to be managed and allow escapement goals to be reached. Percentage allocation has been finally and legally established by the federal courts having exclusive constitutional authority to make a determination in the area of national treaties. While we suggest that the federal courts might well devise a management scheme that would better serve the preservation of the fisheries than Washington, they have not done so. To so do, would require the federal courts to make political decisions as to how, by whom and where the respective Indian and non-Indian allocations would be harvested. The federal courts have neither the inclination or capacity to make these intertribal, domestic and international political decisions.

Unfortunately, there have been times when it has been necessary for the federal courts to restrict harvest by certain Indian and non-Indian fishing groups. These decisions have been firmly based on perpetuation of the resource or in protection of a previously legally determined allocated share. The fact that these decisions have been made necessary by political decisions does not make the federal courts the fish management agency as Washington contends. The actions of the District Court under review, resulted from Washington's failure to comply witth the 1974 decision of the

District Court. These federal court actions have been the only effective method available to protect the rights of the parties and the resource.

The failure of Washington to comply with the District Court's decision has led the Yakima Nation to restrain its fishermen from fishing in the Puget Sound area. This hampers the Yakima Nation's enjoyment of declared rights. The Yakima Nation continues to be concerned about the Washington incited lack of order in the Puget Sound area and the obvious damage to the resource resulting from the illegal fishing. Washington by its nonfeasance and misfeasance may have forfeited any right as a management agency, but the federal courts are limited to the protection of respective shares and the resource, and have correctly confined their actions to this legitimate purpose.

2. Washington Cannot now Attack Lower Courts Interpretation of the Yakima Treaty

The primary thrust of Washington's petition and brief is an attack on the affirmed 1974 Judgment of the United States District Court for the Western District of Washington. This decision determined the extent and nature of the off-reservation reserved treaty fishing rights of the Yakima Nation and other tribal respondents in Puget Sound. This 1974 judgment was affirmed by the Court of Appeals for the Ninth Circuit. (520 F. 2d 676 (1975)). In 1976, this Court declined

to review this determination (cert. denied, 423 U.S. 1086).

This Court should not review the 1975 affirmation. The 1974 judgment is *res judicata* and the law of the case. In reaching this conclusion, your writer is aware that this Court reviewing a *final* judgment on certiorari will reach back and review the interlocutory proceedings below. This is the practice of this Court even though an attempt to obtain this Court's review of these interlocutory proceedings was not successful. However, it does not follow that this Court will reach back and review a final judgment when reviewing an enforcement order on certiorari.

This Court has pointed out in *Hughes Tool Co. vs. Trans World Airlines*, 409 U.S. 363 (1973) at Note 1, the necessity of a "final judgment" before previous interlocutory orders may be reviewed. Although the 1974 judgment was a "final judgment," the Yakima Nation contends this Court lacks jurisdiction to review the 1974 judgment now. Congress has provided under its authority contained in Section 2, Article III of the Constitution, that a writ of certiorari intending to bring any such judgment or decree or proceeding before this Court, shall be taken within ninety days from the entry of judgment, order or decree. 28 USC §2101(c). This is a jurisdictional rule. This Court has said, "the purpose of statutes limiting the period of appeal is to

set a definite point of time when litigation shall be at an end, . . . any other construction of the statute would defeat its purpose." *Matton Steamboat Co. v. Murphy*, 319 U.S. 414, 415 (1943).

As regards the Yakima Nation, Washington is collaterally estopped from attacking the District Court's determination of the extent of the Yakima Nation's off-reservation reserved treaty fishing rights, and the power of the district court to issue orders protecting those rights. Washington is a party to a case in which the affirmed judgment provides for a 50% allocation to the Yakima Nation under the *Treaty with the Yakimas*.[3] No appeal or review of that determination was sought. In the same Circuit Court case that Washington wishes reviewed, the Circuit Court upheld the authority of the Oregon District Court to enforce the allocation of treaty and non-treaty shares in Columbia River waters.[4] Both Washington and the Yakima Nation were parties to those proceedings and no review of that holding has been sought by Washington in this Court.[5] Since these same issues have become final in

[3] *United States v. Oregon and Washington*, 529 F.2d 570 (1976).

[4] *Columbia River Fishermen's Protective Union, Inc. et. al v. United States District Court for the District of Oregon*, 573 F.2d 1123 (1978) (Washington's Petition A1).

[5] We suggest that Washington does not seek review because review would show that another state (Oregon) does not support its position regarding enforcement. In this case, Oregon supported the power of the federal courts to enforce its allocation decree. Further, since the District Court of Oregon decree being enforced was agreed to by Washington, it would further indicate to this Court that Washington's promises leave something to be desired.

parallel legal proceedings between the same parties, Washington is collaterally estopped from raising these issues here. *Commissioner vs. Sunnen*, 333 U.S. 591, (1948).

3. Holdings of the Lower Court's Should be Affirmed

The applicable portion of Article III of the *Treaty with the Yakimas*, provides:

> "The exclusive right of taking fish in all streams where running through or bordering said reservation is further secured to said Confederated Tribes and Bands of Indians, as also the right of taking fish at usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them . . . "

In executing the 1855 *Treaty with the Yakimas*, the United States promised, and the Yakima Nation understood, that Yakimas would forever be able to exercise off-reservation fishing practices. Washington does not contest that the parties to the *Treaty with the Yakimas* understood that the treaty perpetually reserved, as to *time*, *place*, *method*, *species* and *extent*, the existing off-reservation fishing practices. It is uncontested that, at treaty time, four hundred Yakima members were landing salmon and steelhead in sizeable quantities in the Puget Sound area by traps, weirs, nets, gillnets, baskets and seines. The Yakima Nation relied on these promises and they were a material and basic part of the *Treaty with the Yakimas*. (A 159, FF 156). The Yakimas are dependent upon fishing to sustain them-

selves and have traditionally conducted their fishery in a regulated manner that does not impair or endanger the resource. (A 158-159).

In the questions presented, Petitioners have not sought review of the decreed right of the Yakimas to continue the exercise of their fishery without state regulation. Further, the holding below, that the Yakima Nation may continue its treaty reserved, and tribally regulated, off-reservation fishery without state regulation, is supported by the uncontested record and by previous decisions of this Court. The allocation method selected by the District Court to protect the reserved treaty fishery is within the District Court's discretion and is supported by the record below and previous decisions of this Court.

In *United States vs. Winans*, 198 U.S. 371 (1905), this Court held that the off-reservation fishing rights of the Yakima Nation in Article III were part of the larger rights possessed by the Yakimas "upon the exercise of which there was *not a shadow of impediment.*" This Court held that the provisions of a share for the territorial citizens in Article III was a grant from the Yakima Nation to the citizens and not a grant by the United States to the Yakima Nation. This Court then determined that this grant of a share to citizens did not permit citizens to use of methods of harvest, or allow them means of exclusion that would preclude the Yakimas from exercising their reserved treaty fishing rights. In so holding, this Court expressly rejected Washington's current contention that treaty Indians exercising their treaty rights are bound by state law like any other citizen. This Court construed Article III as the Indians understood it, without regard to technical rules.

Subsequently, in *Seufert Brothers Co. v. United States*, 229 U.S. 198 (1919), this Court again held that Article III should be construed as understood by the Yakima Nation without regard to technical rules. This Court further held that these off-reservation reserved treaty rights were not limited to the area ceded to the United States by the *Treaty with the Yakimas.*

Thereafter, in *Tulee v. Washington*, 315 U.S. 681 (1942), this Court for the third time held that Article III should be interpreted in accordance with the meaning it was understood to have by the Yakima Nation's representatives at the Treaty Council.

The understanding by the Yakima Nations representatives at the Walla Walla treaty council as to what the treaty provided is to be found in District Court's Finding of Fact 156. The District Court found that the United States' promises coincided with what the Yakima Nation understood was provided in the *Treaty with the Yakimas.* Namely, that the Yakima Nation would *forever* be able to continue existing off-reservation fish-

ing practices as to *time, place, method, species* and *extent.* This finding, not controverted below or contested in this review, amply supports the holdings below that the Yakima Nation may continue its treaty reserved off-reservation fishery without state regulation under provisions that allocate the fishery to provide treaty Indians with the opportunity to exercise this reserved right.

As to state power to regulate Indian fisheries, the District Court below has analyzed the *obiter dictum* statements of this Court (A73-79) and points out that these statements should receive further analysis by this Court. It is clear that this Court's statement in *Tulee v. Washingon, supra,* that the state has power to impose non-discriminatory restrictions concerning the time and manner of fishing outside the reservation as are necessary for the conservation of the fishery, was clearly without the purview of the case. The only regulations at issue in *Tulee* were licensing requirements, and this Court held that the Yakima treaty forecloses any such regulation. There was no showing in *Tulee* nor is there in the instant case that any state regulation is necessary to preserve the fishery. Indeed, in the instant case, the record clearly shows that no state regulation is necessary, and petitioners have not raised this issue in their questions presented. The Yakima Nation contends, under the facts of *Tulee* and this case, that

the state may not regulate members of the Yakima Nation fishing in conformity with tribal regulations. *Winans* acknowledges that the Yakima Indians understood that there was not to be a "shadow of impediment" on the exercise of their reserved fishing rights. The Courts below found that the treaty Indians did not understand that their fishing rights would be regulated by others and that there was no reason for the State to regulate Yakima members. (A86). Petitioners have not sought review of that determination.

The Yakima Nation is very dedicated to regulation of their fisheries in order to protect the fishery. (A159, FF. 161). It is very necessary that this resource, upon which its members are dependent for their livelihood and way of life, be protected. The Yakima Nation respectfully suggests that the record clearly shows that they have the power and the interest to best regulate their fisheries. (A 86, 158-159, FF. 159-161). Their lifestyle and fishing culture further insure protection of the resource by the Yakima Nation. (A159, FF 162).

In contrast, Washington readily admits that it is unable to regulate its citizen fishermen (Washington's Brief, p. 8). Washington is just as quick to assess the blame for this lack of regulation and control. Washington contends this lack of control has resulted because the federal courts have given the "wrong an-

swer" in interpreting federal treaties. They promise they will properly regulate if this Court will only give the "right answer." Washington's proposed "right answer" is for this Court to ignore the promises made by the United States reserving to the treaty Indians their off-reservation fishery. It is Washington's continued failure to recognize the Indians reserved right protected by the law of the land that has created the current problem. This failure has resulted in "continued anarchy reduced to a system" which has unquestionably harmed the Yakima Nation and continues to do so. Washington has sought to excuse its continued harrassment of the Yakimas by contending they were regulating for conservation. Even under the most liberal interpretations of this Court's *Tulee* dicta, Washington has been unsuccessful in showing any necessity for the regulation of Yakima fishermen who are already tribally regulated in accordance with the Yakima Nation's conservation policies. (A158, FF. 158). However, Washington's continuing efforts and harrassment has previously resulted in a serious limitation of the Yakimas' exercise of their treaty rights in the Puget Sound area. (A158, FF. 158). The current resulting anarchy, fostered by Washington's failure to follow the law of the land, continues to limit the Yakima Nations' exercise of its treaty rights. The Yakima Nation is reluctant to permit its fishermen to

fish in Puget Sound until adequate control over the non-Indian fishery is obtained. These unsettled circumstances, Yakimas' concern for the resource, time and expense limitations, are all factors which continue to restrict Yakimas' exercise of their reserved treaty right.

It is obvious that if the Yakima Indians are to continue to pursue treaty time fishing practices, there must be an adequate fishery at their treaty reserved fishing places. The District Court seeks to protect this reserved treaty right by the allocation of shares. If no fish are available for harvest, reserved treaty rights become mere paper rights. The destruction or monopolizing of the fishery is just as much a breach of the treaty reserved fishing rights as is keeping treaty Indians from their fishing places. Certainly, such circumstances were not contemplated by the parties to the treaty. At treaty times, there was an abundance of fish available for harvest and non-Indian landings were minimal. (A102-103, FF. 89). It was not foreseen by the Indian hosts that permitting a share in the fishery to non-Indian citizens would create the shortages we have today. Indian hosts could not foresee that these new inhabitants would create an ecological crisis that would further damage the resource. Such results were beyond the experience of the Indians.[6] The Indian hosts

[6] At the trial below, counsel for Washington admitted that the consequences of non-Indian harvest and other factors reducing the resource could not have been foreseen by the Indians. R. 68.

had lived in this area for thousands of years and had shared the harvest without any danger to the continued availability of the resource. This area has previously supported a food gathering culture population many times the treaty time Indian and non-Indian population.[7] There was no non-Indian marine fishery and it was not conceivable that the Indian hosts could anticipate that non-Indian harvests away from their fishing places would some day limit the Indians right to fish at their reserved fishing places. It is difficult for the Yakima Nation even today, to believe that this society would foster a harvest system that focuses its effort in areas where immature and mixed species are indiscriminately harvested thereby limiting harvest on mature, segregated stocks in areas where landings can be economically made in furtherance of conservation principles. This is the situation that faced the District Court. The District Court was not considering an adequate fishery resource that had been successfully husbanded for thousands of years by Indian custom. The District Court had to equitably allocate shares of a resource that had been greatly reduced by the harvest and habitat management practices of non-Indians.

The District Court was further faced with the problems of insuring that enough fish to provide for the treaty reserved harvest would reach the treaty fisher-

[7] A.103, FF. 9.

ies and insure an adequate escapement to preserve the resource. Allocation of non-Indian and Indian shares was the method suggested by Washington's Department of Fisheries. Allocation of shares was the method of equitable adjustment adopted by the District Court and approved on appeal. Considering that non-Indian landings at Indian fisheries were minimal and considering non-Indian marine landings did not exist at treaty times, it is certain that the Indian parties to the treaty did not understand they were granting as large a share as is now allocated to non-Indians. Certainly, the Indians would not have understood that such a large share would be landed by non-Indians. The record demonstrates that the Yakima Nation understood that the permitted sharing of their reserved off-reservation treaty rights would not effect their existing fishing practices as to time, place, method, species and *extent.* At treaty times, Indians in this area had been fishing in common with each other without limiting the availability of fish for harvest. (A 105, FF. 13). As hosts, they had every right to anticipate respect for their primary use rights as was accorded by custom in this area. (A104-105, FF. 12-13). Washington's attack on the District Court's reliance on a dictionary in common usage at the time of the Treaty and the Court of Appeals reliance on common law rules regarding property rights, begs the question. Washington, after criti-

cizing the reliance by the Courts below on these technical rules, seeks to impose upon this case common law rules regarding fisheries not previously brought to the attention of the Courts below. The Yakima Nation sugguests that reliance on these sources can be of little help to this Court. The Yakima Nation, with no familiarity with the English language, could not be expected to know about, let alone understand what dictionaries, law treatises, and the common law provided. The record does not indicate that even the treaty negotiators had them in mind. What is important in determining the treaty reserved fishing rights was the understanding of the Indians as to what the treaty provided. In interpreting the Yakima Treaty, this Court has made it clear that the Indian's understanding is the proper basis for construing treaty clauses, not technical rules. *(United States vs. Winans, supra, Seufert Bros. Co. v. United States, supra; Tulee v. Washington,* supra). Based on this Court's announced rules of construction, any objection to reliance on these definitions and concepts belong to the Indian people. These definitions and concepts were used to accord the non-Indian fishermen a much greater share than Indians could have understood was provided by the *Treaty with the Yakimas.* To protect the exercise of the Yakimas' reserved treaty rights, the District Court had power to limit citizens fishing rights. *(United States v. Winans, supra,* at

384). Washington has not shown that the District Court's determination was an abuse of the District Court's power.

The District Court must continue to enforce its decree. Washington promises they can and will implement the Court's decision regarding allocation after receiving this Court's guidelines. Washington gave the same promise to the District Court. Washington then adopted, through concerted executive, legislative and judicial action or inaction, a course of action that has as its acknowledged purpose, the reduction of fully adjudicated treaty reserved fishing rights. Washington's repeated promises taxes our credulity. These promises should not be accepted nor relied upon by this Court. We clearly understand the federal court's reluctance to enforce its judgments by injunctive action. Such injunctive action by the District Court has serious practical limitations. However, until such time as Washington indicates by its *actions* a desire to follow the law of the land, a management system based on Washington's previously broken promise is not justified.

Washington's executive and judicial actions which seek to confront the federal courts in the exclusive federal area of treaty rights is unprecedented for over one hundred years.[8] As this court has reminded us in

[8] See Note 1.

Missouri v. Holland, 252 U.S. 416 (1920), a treaty made by the President with the required concurrence of two-thirds of the Senate is, under the supremacy Clause of Article VI §2, part of "The Supreme Law of the Land" which takes precedence over contrary state law.

Article III of the *Constitution* makes it just as clear that "all cases" "arising under treaties" are within the judicial power of the United States which is vested in the "Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Washington's reliance on Article X to excuse this conflict is inapposite. Article X must give way to Article VI and Article III, which, with absolute clarity and without exception, hold that the federal courts shall determine treaty rights.

Washington, as a basis for this review, has readily admitted that it has been unable to protect the national interest in reserved treaty rights. This inability is coupled with lack of will. Therefore, the District Court has found it necessary to fashion a remedy to protect these fully litigated reserved rights. This Court has made it clear that the lower courts have a duty to fashion such a remedy. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *Swan v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *Hecht Company v. Bowles*, 321 U.S. 321, 329 (1944); *Hutto v. Finney*, ___ U.S. ___ 46 L. Week 4817, 4819 (June, 1978).

The District Court accepted its responsibility. This Court should approve the District Court's limited action and call for continued District Court supervision until such time as Washington has demonstrated, not only its ability, but its willingness to implement the decisions of the federal courts in this area of national purpose.

CONCLUSION

For the reasons expressed herein, review of the lower Courts determinations should be limited. The lower courts determination of the reserved treaty off-reservation fishing rights should be affirmed.

The lower courts allocation of the reserved treaty share of the resource should be affirmed.

The lower courts enforcement of its determination and allocation should be affirmed.

As a final note, we use the words of Yakima Chief Kamikan at the treaty grounds to indicate what general relief the Yakimas request: "Let them do as they have promised."

Respectfully submitted,

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Jan. 31, 1979

opposition

FOR ARGUMENT

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
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OF THE
UNITED STATES

OCTOBER TERM, 1978
No. 78-119

STATE OF WASHINGTON, et al.,
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vs.
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Respondents,

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,
vs.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, et al.,
Respondents.

RESPONDENTS' CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON and CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION
BRIEF

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OPINION BELOW

The decision by the United States Court of Appeals for the Ninth Circuit in Puget Sound Gillnetters Ass'n v. U. S. Dist. Court, 573 F2d 1123 (9th Cir. 1978) involved a series of consolidated cases. Washington and non-treaty fishers appealed several decisions of the United States District Court for the Western District of Washington under its continuing jurisdiction in the "Puget Sound case" United States v. Washington, 384 F Supp 312 (WD Wa 1974), 520 F2d 676 (9th Cir 1975) cert den 423 US 1086 (1976) Also before the Court were petitions for writs of prohibition and mandamus against the Washington District Court and the Oregon District Court brought by non-treaty fishing associations challenging the underlying judgments. Finally, non-treaty fishermen appealed enforcement orders issued by the United States District Court for the District of Oregon under its continuing jurisdiction in the "Columbia River case," Sohappy v. Smith, 302 F Supp 899 (D Or 1969), to carry out the terms of a stipulated settlement agreed to by all parties and adopted by order of the Court. (A-3) The Ninth Circuit issued one opinion for the consolidated cases. The decision of the Ninth Circuit in the cases from Puget Sound are the subject of certiorari in Nos. 78-119 and 78-139 before this court. No party appealed from the decision of the Ninth Circuit as it related to the appeal and petition for writs in the Columbia River case. Therefore, this Court does not have before it any issue as to the validity of any proceeding in the Columbia River case. Pasadena City

Bd of Ed. v. Spangler, 427 US 424, 432, (1976). However, as a party respondent before the Ninth Circuit, the Confederated Tribes of the Warm Springs Reservation of Oregon and the Confederated Tribes of the Umatilla Indian Reservation are parties in this proceeding pursuant to Sup. Ct. R. 21.

TREATIES INVOLVED

The Columbia River case involves four treaties between the United States and Indian tribes: Treaty with the Tribes of Middle Oregon, June 25, 1855, (12 Stat. 963); Treaty with the Yakima Tribe, June 9, 1855, (12 Stat. 951); Treaty with the Umatilla Tribe, June 9, 1855, (12 Stat. 945); and Treaty with the Nez Perce Tribe, June 11, 1855, (12 Stat. 957). Only the treaty with the Yakimas is also involved in the Puget Sound case but each of the treaties contain similar language concerning off-reservation fishing rights.

STATEMENT OF THE CASE

Respondents believe that a statement of the case as to the Columbia River case is both relevant and pertinent in assisting this Court in a decision in the Puget Sound case and understanding how a decision in the Puget Sound case will impact the Columbia River case and most importantly as illustrating the only real means of settling this controversy.

Sohappy v. Smith, 302 F Supp 899 (D Or 1969) was orginally brought by the United States as plaintiff with only the

state of Oregon as defendant and was consolidated with a separate case brought by individual treaty Indians seeking similar relief. The four Columbia River treaty tribes, the Warm Springs, Yakima, Umatilla and Nez Perce, intervened. In its decision the District Court set forth standards to be applied by the state regulatory agencies in managing the fisheries resource such that the treaty tribes and their members:

> "***will be accorded an opportunity to attempt to take, at their usual and accustomed fishing places, by reasonable means feasible to them, a fair and equitable share of all fish which it permits to be taken from any given run." Sohappy v. Smith, Id. at 907.

The Court also retained jurisdiction to grant further or amended relief. No one appealed.

During the next several years there were many additional hearings in the Columbia River case. In each instance but one, where the Court reversed itself eight days later, the United States and the intervenor tribes prevailed and relief was granted. Oregon did not appeal any of these orders.

In the spring of 1974 Washington intervened as a party defendant. At the same time a dispute arose over the allocation of harvest opportunity on the 1974 spring run of Chinook salmon. The Court decreed that Indian treaty fishermen were entitled to have the opportunity to take up to 50% of the harvest of the spring Chinook salmon run des-

tined to reach the tribes' usual and accustomed fishing places. Both Oregon and Washington appealed and the Court of Appeals for the Ninth Circuit affirmed. Sohappy v. Smith, 529 F2d 570 (9th Cir 1976) Neither Oregon nor Washington appealed from that decision.

The controversy continued during the following years. Finally, at the urging of the District Court for Oregon, the parties to the Columbia River case entered into intensive and difficult negotiations and finally arrived at an agreement which was incorporated in a "Plan for Managing Fisheries on Stocks Originating from the Columbia River and its Tributaries Above Bonneville Dam" (Comprehensive Plan). (A-3-14) This plan was accepted and signed by the governors of Oregon and Washington and the leaders of the four Columbia River tribes as well as by the United States and was approved and adopted by court order on February 28, 1977. (A-3) This plan does not strictly follow the prior decrees of the Court in interpreting the extent of the treaty fishing rights but reflects a compromise accepted by all parties. Since the adoption of the Comprehensive Plan, the situation on the Columbia River has stabilized, although minor problems of enforcement remain. Puget Sound Gillnetters Ass'n v. U. S. Dist. Court, 573 F2d 1123, 1126 (9th Cir 1978).

In the fall of 1977, based upon the decisions of the Washington Supreme Court in Puget Sound Gilnetters Ass's v. Moos, 88 W2d 677, 565 P2d 1151 (1977) and Washington State Com'l Passenger Fishing Vessels Ass'n v. Tollefson, 89 W2d 276, 571 P2d 1373 (1977), Washington

officals refused to enforce regulations adopted by Oregon and Washington fishery regulatory agencies to carry out the terms of the Comprehensive Plan even though Washington, through both its governor and attorney general, had stipulated to the terms of the plan and had never raised any question in the Oregon District Court concerning Washington's authority to enter into the agreement and consent to the decree. Puget Sound Gillnetters Ass'n v. U. S. Dist. Court, supra at 1133.

Nontreaty fishermen, realizing that Washington would not enforce the regulations, commenced massive illegal fishing efforts in the Columbia River which would have deprived the treaty fishermen of their allocation under the Comprehensive Plan. Attempting to insure that the Comprehensive Plan would be carried out, both the United States and Oregon sought injunctive relief against nontreaty fishers and the enforcement orders issued by the District Court were the subject of appeals in the Ninth Circuit. The nontreaty fishermen also sought writs of prohibition and mandamus against the District Court challenging the terms of the Comprehensive Plan.

Before the Ninth Circuit, all of the parties to the Columbia River case, including Oregon, resisted the challenge to the Oregon District Court's orders except for Washington which took the extraordinary position that it had no authority to agree to the compromise settlement which the governor and the attorney general of that state had signed in 1977 (A-2, 15) and which

became a stipulated order of the Court. Oregon not only has accomodated itself to the decision and has never appealed to this Court for review but advocated the position adopted by the Ninth Circuit in the Columbia River case. No one petitioned this Court to review the portion of the Ninth Circuit decision pertaining to the Columbia River case.

ARGUMENT

While major factual differences exist between the Puget Sound case and Columbia River case, the key issue in each case is the interpretation to be given to the treaty language reserving fishing rights at all usual and accustomed fishing places "in common with citizens". Respondents Warm Springs Tribes agrees with the United States and the Puget Sound Tribes that United States v. Washington, 384 F Supp 312 (WD Wash 1974), 520 F2d 676 (9th Cir 1975), cert den 423 US 1086 (1976), was correctly decided and is not now subject to challenge and must be upheld. However, a major difference exists in the approach of the Oregon District Court from that of the Washington District Court and this Court may utilize the approach of the Oregon District Court in upholding the sanctity of the Indian treaties.

Since the beginning of the Columbia River case, the Oregon court has urged the parties to achieve an accomodation of this controversy. In his original opinion Judge Belloni said:

> "This court cannot prescribe in advance all of the details of

> appropriate and permissible regulation of the Indian fisheries, nor do the plaintiffs ask it to.***
>
> "I also do not believe that this court should at this time and on this record attempt to prescribe the specific procedures which the state must follow in adopting regulations applicable to the Indian fishery. The state must recognize that the federal right which the Indians have is distinct from the fishing rights of others over which the state has a broader latitude of regulatory control and that the Tribal entities are interested parties to any regulation affecting the treaty fishing right. Sohappy v. Smith, 302 F Supp 899, 911-12.

In its decree, the Oregon court left it to the parties to determine what the proper treaty share was, setting forth only guidelines and standards which must be applied to arrive at the "fair and equitable share".

In the spring of 1974, and following the decision in United States v. Washington, supra, the Oregon court did decree that the treaty Indians have the opportunity to harvest up to 50% of the spring chinook salmon run. Neither at that time nor any time prior to the adoption of the Comprehensive Plan did the Oregon court make any ruling with regard to excluding on-reservation, subsistence or ceremonial catch from counting toward the treaty Indian allocation. This order was based on the states' failure to present any other

option to the court. As the Ninth Circuit pointed out:

> The states, not the Indians, have the burden of establishing the respects, if any, in which the proposed allocation of future spring Chinook Salmon runs is inequitable or impracticable and of offering alternative allocation proposals which will as well or better protect the Indians treaty rights as defined by the 1969 decree and conserve this fish resource." Sohappy v. Smith, 529 F2d 570, 573.

Finally the Oregon court directed the parties to attempt to arrive at an agreement to settle this controversy. This resulted in all parties, including Washington, agreeing to the terms of the Comprehensive Plan which was adopted by the Court. The Oregon Court properly recognized that a controversy involving the racial, emotional and economic factors present in these cases can be solved only when the states themselves accept responsibility for caring out the terms of the Indian treaties. The Ninth Circuit recognized the wisdom of this approach when it concluded:

> "We do not entertain the illusion that this is the last appeal we will see in this case. The issues involved are too volatile and raise too many emotions for a mere statement of the law to resolve them. On the other hand, neither this court nor the district court has any desire to be a permanent fish-

> master in Washington waters. It is to be hoped that the parties can reach an agreement as they did in the Oregon case, and that Washington law will be changed to allow the state to carry it out. Until the state decides to cooperate, the district court will have to continue protecting the tribes' rights. The state and the fishers hold the key to lifting federal judicial interference with their fish-management perogatives." Puget Sound Gillnetters Ass'n v. U. S. Dist. Court, supra at 1133.

The Ninth Circuit has correctly observed a close analogy between these cases and the desegregation cases. Puget Sound Gillnetters Ass'n v. U. S. Dist. Court, supra at 1126. As with the desegregation cases, a weak and politically impotent minority has sought to protect its rights through the federal courts. No other avenue is available because of the political power of those opposing the rights. The decisions upholding treaty fishing rights have been extremely unpopular with the non-treaty fishermen and their governmental allies in the Northwest and have resulted in defiance of the Federal Court orders leading to the enforcement orders issued by both District Courts which were appealed in Puget Sound Gillnetters Ass'n v. U. S. Dist. Court, and to the Washington Supreme Court refusing to following the holding of the federal court on a matter of federal law. Puget Sound Gillnetters Ass'n v. Moos, supra, Washington State Com'l Passenger Fishing Vessels Ass'n v.

Tollefson, supra. Through this defiance of federal law, Washington and the non-treaty fishers have gained a foothold in this Court. These efforts should not be allowed to succeed. As this Court has held in the desegregation cases, "it should go without saying that the vitality of these constitutional principals cannot be allowed to yield simply because of disagreement with them." Brown v. Board of Education, 349 US 294, 300 (1955).

As in the desegregation cases, the state of Washington is going to extraordinary lengths to avoid implementation and recognition of the federally protected rights and thereby deny them. This Court has repeatedly struck down such attempts in desegregation cases. Wright v. Council of the City of Emporia, 407 US 451 (1972); United States v. Scotland Neck Board of Education, 407 US 484 (1972); Milliken v. Bradley, 418 US 717 (1974); and Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 US 1 (1971).

Washington's contended construction of the "in common with" language of the treaties would deny any purpose or meaning to that provision which all parties have recognized was of utmost importance to the Indians at the time the treaties were negotiated. It is obvious that if the state regulatory scheme allows all harvestable surplus of a run of fish in excess of the necessary spawning escapement to be intercepted prior to the time the run reaches the treaty Indians' usual and accustomed fishing places, this most important treaty provision would be stripped of

all meaning. Such would be an impotent result of the treaty negotiations and it cannot be envisioned that this is what the Indians expected from their negotiations. United States v. Winan, 198 U.S. 371, 380 (1905).

Washington's contention that by providing regulations equally applicable to treaty and non-treaty fishermen alike in areas under its jurisdiction it has satisfied the treaty obligation (Wash Br. 61) has no more validity than the separate but equal contention struck down by this Court in Brown v. Board of Education. Washington's plan is designed to totally deny the treaty fishing right by permitting interception of the fish before they reach the usual and accustomed fishing places of the treaty Indians. The fact that treaty Indians have the right, as citizens, to fish in other places does not justify the state's position. In short, the state's plan is not acceptable simply because it appears to be neutral in providing fishing opportunity. Swann v. Charlotte-Mecklenberg Bd. of Ed., supra at 23. The treaty provision requires that a segment of the run be allowed to reach the usual and accustomed fishing places to give the Indians the opportunity to harvest them. No other conclusion would give effect to the treaty. United States v. Winans, supra at 381.

It can be easily understood how the intransigence of Washington led to Judge Boldt's decree in the Puget Sound case. The attitude of Washington, supported by its non-treaty constituents, has been well documented by the Ninth Circuit. United States v. Washington, 520 F2d

676, 685, 693 (concurring opinion) (9th Cir 1975), Puget Sound Gillnetters Ass'n v. U. S. Dist. Court, supra at 1126 and United States v. Olander, _____ F2d _____ (9th Cir, decided September 7, 1978). Washington's long history of refusing to recognize treaty Indian fishing rights has led to many of the leading cases in this court upholding the special rights of the Indians. United States v. Winans, 198 US 371 (1905), Tulee v. Washington, 315 US 681 (1942), Puyallap Tribe v. Department of Game, 381 US 392 (1968), Department of Game v. Puyallap Tribe, 414 US 44 (1973), Puyallap Tribe v. Department of Game, 433 US 165 (1977). Washington continues to defy the Federal courts and has never presented to the Court any proposals for implementation of fishing regulations which recognizes the rights secured by the treaties. Under these circumstances, the District Court properly exercised its equitable powers and molded its decree to the necessity of the case. Swann v. Charlotte-Mecklenberg Bd. of Ed., supra at 15. In the absence of a solid affirmance by this Court, Washington will surely continue its course of systematically and illegally denying treaty fishing rights. Further, the opportunity for lasting settlement will be lost.

THE HATCHERY FISH ISSUE

Most of the issues discussed in this appeal, other than the interpretation of the "in common with" language have no direct bearing on the Columbia River case. However, the hatchery fish issue has a great impact on the Columbia as hatchery-reared fish make a significant contribution to the Columbia

River salmon and steelhead resource. Washington's cursory and simplistic approach to this issue does not present its true importance to the Court. The circumstances concerning the contribution of hatchery fish to the resource are nearly as varied as the number of streams which produce these fish.

Prior to the adoption of the Comprehensive Plan, the District Court for Oregon never made any specific ruling concerning hatchery fish. The Comprehensive Plan specifically provides that hatchery fish shall be included in the allocations contained in the Plan. (A-5) The Columbia River tribes agree with the contentions of the United States and the Puget Sound tribes that the harvest opportunities decreed by the District Court includes hatchery-reared as well as naturally produced anadramous fish. An examination of the hatchery situation on the Columbia River illustrates why this is so.

Access of upstream migrant anadramous fish to spawning areas in the upper Columbia River and its tributaries is impeded by a series of hydroelectric dams, mostly federal, the most famous of which is Bonneville Dam. In connection with the authorization for the construction of these projects, the Congress has followed a clear policy of requiring protection and replacement of fishery resources destroyed by the developers of these projects. This policy is fully discussed in a comprehensive opinion by the Interior Department solicitor. 83 Interior Dec. 589, Opinion No. M-36885 (November 22, 1976)

This memorandum deals specifically with the authorization of the Bonneville Power Administration to expend funds for fishery protection and enhancement purposes. The memorandum notes:

> "The responsibility of developers and operators of hydro-electric power facilities to take measures to protect fish in the rivers of the United States from the effect of the operation of such facilities is a long standing policy of Congress." 83 Interior Dec. at 598 page.

The Solicitor noted that the Federal Power Act of 1920, 16 USC 811, not only authorized the Commission to require fishways but included other types of mitigation replacement and even enhancement. 83 Interior Dec. at 598-99 page. The Secretary of the Interior's trust responsibility for protection of Indian fishing rights from the consequences of hydro-electic developments was emphasized. 83 Interior Dec. at 599, 601.

The major hatchery developments on the Columbia River system have been federally financed pursuant to this stated Congressional policy. The hatcheries were constructed to mitigate the effects of the hydroelectric construction. Congress recognized that there would be severe adverse impacts on anadramous fish from these projects and appropriated funds to provide hatcheries and other measures to replace those fish lost due to the dams. It was intended to replace those fish lost for the benefit of those who had the right to enjoy them including the treaty Indians.

Thus, the Columbia River tribes are an intended beneficiary of these hatchery produced fish to the same extent as they have rights on the naturally spawned fish.

The parties to the Comprehensive Plan recognized this principle when they stipulated as a part of the Plan that hatchery fish would be subject to the same allocations as natural fish. (A-5)

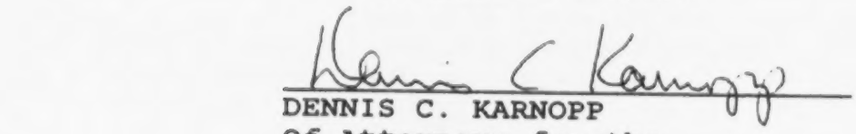
The situation of the hatchery fish on the Columbia River demontrates that there is no justification for Washington's contentions for wholesale exclusion of hatchery fish from the treaty Indian fishing opportunity.

CONCLUSION

The Circuit Court must be affirmed. To do otherwise is to reward Washington and the non-treaty fishers for their blalant violations of federal law. Further, Oregon, which has not appealed and has attemped to comply with federal law and which supported the decision of the Ninth Circuit being reviewed as well as the Columbia River tribes, who have demonstrated the ability to achieve a voluntary settlement of this controversy will be penalized. Such a settlement is possible in the Puget Sound case but only if this court clearly and unequivocally requires Washington to obey the decrees of the lower Federal Courts. Washington must implement the orders of the lower Federal Courts unless and until it can present the Court with some alternative regulatory scheme which will give the rights of the treaty Indians

the recognition they deserve. In no event should the opinion of this court interfere with or draw into question the terms of the decrees in the Columbia River case or act as a roadblock to the future use of a negotiated settlement as a means of settling the Puget Sound case.

PANNER, JOHNSON, MARCEAU
KARNOPP & KENNEDY



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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiffs, v. STATE OF OREGON, Defendant, and THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON; CONFEDERATED TRIBES & BANDS OF THE YAKIMA INDIAN NATION; CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION; and NEZ PERCE TRIBE OF IDAHO, Intervenors, STATE OF WASHINGTON,	CIVIL NO. 68-513 MOTION

Intervenor. .)

All parties hereby move this Court for an Order approving the Plan for Managing Fisheries on Stocks Originating from the Columbia River and its Tributaries Above Bonneville Dam, which is attached hereto as Exhibit "A."

DATED February 28, 1977.

Respectfully submitted,

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Attorney for Oregon Fish and Wildlife Department

/s/ James M. Johnson
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/s/ Robert C. Strom
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/s/ Douglas R. Nash
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Attorney for Umatilla Tribe

IT IS SO ORDERED.

/s/ ROBERT J. BELLONI
ROBERT J. BELLONI
United States District Judge

A PLAN FOR MANAGING FISHERIES ON STOCKS ORIGINATING FROM THE COLUMBIA RIVER AND ITS TRIBUTARIES ABOVE BONNEVILLE DAM

The purpose of the plan shall be to maintain, perpetuate and enhance anadromous fish and other fish stocks originating in the Columbia River and tributaties above Bonneville Dam for the benefit of present and future generations, and to insure that the Nez Perce Tribe of Idaho, Confederated Tribes of the Umatilla Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakima Indian Nation,

hereinafter called Tribes, having the right to fish based on a treaty with the United States are accorded the opportunity for their fair share of harvest, and to provide for a fair share of the harvest by nontreaty user groups.

This plan is based upon the unique circumstances relating to the Columbia River system and the parties hereto and does not necessarily have application in other fisheries.

The parties also recognize the substantial management problems resulting from the ocean harvest of mixed stocks of anadromous fish originating from the upper Columbia River and its tributaries and the wastage resulting from fishing on immature stocks. The parties will continue joint efforts to collect and gather data on this fishery and to reduce inefficient and wasteful harvest methods.

Due to the environmental factors totally unrelated to the treaty or nontreaty fisheries, there has been a continual decline of some runs of anadromous fish in the Columbia River system. This trend could deprive not only the treaty Indians, but also other user groups of the opportunity to harvest anadromous fish. The parties pledge to work cooperatively to maintain the present production of each run, rehabilitate runs to their maximum potential and to work towards the enhancement and development of larger and additional runs where biologically and economically feasible.

(1) The managing fishery agencies shall make every effort to allocate the available harvest as prescribed in this agreement on an annual basis. However, because run size cannot always be accurately calculated until some lower fishery has taken place, annual adjustment of the sharing formulas for each species may be required to provide the appropriate shares between treaty and nontreaty users. If treaty and nontreaty users are not provided the opportunity to harvest their fair share of any run as provided for in this plan, every effort shall be made to make up such deficiencies during the next succeeding run of the same race. Overall adjustments shall be made within a 5-year time frame.

(2) The treaty Indian tribes and state and federal agencies shall diligently pursue and promote through cooperative efforts the upriver maintenance and enhancement of fish habitat and hatchery rearing programs, and so far as practicable, maintain present productions of each run and to rehabilitate runs to their maximum potential.

(3) Hatchery salmon and steelhead released to maintain or restore runs above Bonneville Dam shall be shared pursuant to this plan.

(4) A technical advisory committee shall be established to develop and analyze data pertinent to this agreement, including but not limited to the following: calculated run size for all species of fish, ocean catches, escapement goals, catch allocation and adjust-

ments, dam loss, habitat restoration, and hatchery rearing programs. Such a committee shall make recommendations to the managing fishery agencies to assure that the allocating in this agreement are realized. Members shall be qualified fishery scientists familiar with technical management problems on the Columbia River. The committee shall be comprised of representatives named by each of the three states, Oregon, Washington, Idaho, National Marine Fisheries Service, U. S. Fish and Wildlife Service and each of the Indian Tribes.

(5) Each party shall develop a catch record program that utilizes reliable statistical methods and effective enforcement procedures as developed by the committee. Indian tribes shall report on appropriate state forms for each species ceremonial, subsistence and any other catch not sold to state-licensed buyers. The states shall report and make available to all interested parties treaty and nontreaty sport and commercial catch for each species. All the above reports shall be made within an agreed upon time schedule.

(6) The states agree to enact or recommend for enactment by the Pacific Fisheries Management Council appropriate conservation regulations for the ocean fishery that will assure an efficient utilization of stocks and will provide for adequate escapement of mature fish into the Columbia River to achieve the goals and purposes of this plan. Marine regulations should attempt to harvest mature fish and reduce waste.

(7) Fish escapement totals, dam loss estimates, or other technical aspects of this agreement may be modified by mutual agreement to reflect current data. In the event that significant management problems arise from this agreement that cannot be resolved by mutual agreement, the parties agree to submit the issues to federal court for determination. In any event, the Court shall retain jurisdiction over the case of U. S. v. Oregon, Civil 68-513, (D.C. Or).

(8) The sharing formulas as set forth in this plan are controlled upon the premise that the marine area catches in U. S. controlled waters of fish originating above Bonneville Dam, other than fall chinook and coho runs, will be regulated by PFMC so as to be essentially de minimis portions of those runs. The parties acknowledge that if subsequent data should indicate that this premise is incorrect, these formulas may require revision.

(9) Regulations affecting treaty users which are enacted in conformity with this comprehensive plan shall be considered as complying with the court's decrees enunciated in U. S. v. Oregon, Civil No. 68-513, District of Oregon.

(10) Tribal members fishing pursuant to this agreement may employ only members of the Tribes, while exercising their treaty fishing rights.

(11) All fish numbers referred to in this agreement are adult fish.

(12) The sharing formulas contained herein for determining the treaty fishery share refer to those fish caught in the Columbia River below McNary Dam and any other inland off-reservation catch placed in commercial channels.

Except as provided in subparagraph 5 under Spring Chinook, neither treaty nor nontreaty non-commercial harvest in tributaries, or in the mainstem Columbia River above McNary Dam, shall be considered in the sharing formulas contained herein.

(13) Upon thirty days written notice by any party, after five years from date, this comprehensive plan may be withdrawn or may be renegotiated to assure that the terms set forth represent current facts, court decisions, and laws.

Fish Management Plan

A fish management plan has been adopted for those species of importance to assure future conservation of the resource and equitable sharing of the harvest between treaty Indians and nontreaty users. The formulas represent Available Fish for Harvest and may not reflect total catch if fishing effort is inadequate to harvest all available fish. All runs of fish described in this plan are those originating in the area of the Columbia River or its tributaries above Bonneville Dam.

Fall Chinook Salmon

The Columbia River fall chinook shall be managed under the following plan:

(1) Run size shall be determined by the number of fish entering the Columbia River which are destined to pass Bonneville Dam.

(2) Escapement of 100,000 fish above Bonneville Dam shall be subtracted from total in-river run size.

(3) Additional fish above ascapement are available for harvest and shall be shared 60% by treaty fishermen and 40% by nontreaty fishermen.

(4) The states' goal is to manage the fisheries to provide and maintain a minimum average harvestable run size of 200,000 upriver fall chinook to the Columbia River.

(5) The 60% treaty share shall include mainstem ceremonial, subsistence, and commercial harvest as allocated by the Indian tribes. The 40% nontreaty share shall include in-river commercial and sport harvest as allocated by the appropriate agencies.

Spring Chinook

The Columbia River spring chinook shall be managed under the following plan:

(1) Run size shall be determined by the number of fish entering the Columbia River destined to pass Bonneville Dam.

(2) Spawning escapement goals shall be a minimum of 120,000 and 30,000 fish above Bonneville and Lower Granite Dams respectively.

(3) The states' goal is to manage the fisheries to provide and maintain a minimum average run size of 250,000 upriver spring chinook to the Columbia River.

(4) Treaty ceremonial and subsistence catch shall have first priority. The fisheries shall not exceed a catch of 2,000 fish on a run size of less than 100,000 fish; 5,000 on a run size of between 100,000 and 120,000 fish; and 7,500 fish on a run size of between 120,000 fish and 150,000 fish. Treaty ceremonial and subsistence fishing for spring Chinook with gillnets as well as other normal gear may occur, but such gillnet fishing shall be subject to a notification system similar to that presently used for ceremonial fishing. All catches shall be monitored cooperatively for the purpose of ascertaining the amount of the catch.

(5) On a run size of between 120,000 and 150,000 fish passing Bonneville Dam, the nontreaty fisheries are limited to the Snake River system and may harvest fish which are in excess of the 30,000 spawning escapement passing Lower Granite Dam. (Under average river flow conditions, 120,000 fish at Bonneville Dam will generally provide 30,000 fish at Lower Granite Dam and 150,000 fish at Bonneville Dam will generally provide 37,500 fish at Lower Granite Dam.

(6) On a run size of more than 150,000 fish passing Bonneville Dam, all allocations as provided for in items 4 and 5 shall occur. All additional fish

available for harvest below McNary Dam shall be shared 40 percent for treaty fishermen and 60 percent for nontreaty fishermen. If river passage conditions improve so as to provide more than 40,000 fish at Lower Granite Dam on run sizes of 150,000 fish or less, the 40 percent and 60 percent allocation may occur on a run size of less than 150,000 fish at Bonneville Dam.

Summer Chinook Salmon

Summer chinook salmon runs are precariously low and do not warrant any fishery at the present time, with the exception of a treaty subsistence, ceremonial, and incidental catch not to exceed 2,000 fish during the months of June and July.

The parties agree that if the run size increases a formula for sharing of the available harvest above present escapement goals for this race shall be similar to spring chinook.

Summer Steelhead

(1) Run size shall be determined by the number of fish entering the Columbia River destined to pass Bonneville Dam.

(2) The escapement goal to spawning grounds above lower Granite Dam shall be a minimum of 30,000 fish. A run size of 150,000 fish at Bonneville Dam will provide for 30,000 fish at Lower Granite Dam.

(3) The treaty Indian mainstem fishery shall be limited to ceremonial, subsistence and incidental catch to other commercial fisheries. A minimum mesh restriction of 8 inches will be utilized to limit incidental catch.

(4) The Indian tribes recognize the importance of the steelhead stocks to recreational users and agree to forego a target commercial fishery.

Sockeye Salmon

Sockeye salmon runs are precariously low and do not warrant any fishery at the present time, with the exception of a treaty subsistence, ceremonial, and incidental catch not to exceed 2,000 fish.

The parties agree that if the run size increases so as to provide harvestable quantities, such harvest shall be shared equally between treaty and nontreaty fishermen.

The parties recognize the importance of protecting summer chinook and summer steelhead stocks during the harvest of sockeye salmon. Incidental catch of summer chinook and steelhead shall be minimized by providing appropriate restrictions to the sockeye fishery.

Coho Salmon

Coho stock are in the treaty fishing area simultaneously with other species which currently need protection from fishing effort. Parties agree to use their best efforts to develop methods to

maximize coho harvest while protecting those other species.

Shad

Shad runs have been sufficiently large to allow for unlimited harvest. However, because shad fisheries can take stocks of salmon and steelhead that are below harvestable levels, new catch methods shall be pursued particularly by the Indians above Bonneville Dam to assure a sufficient catch of shad while minimizing the catch of other species. If escapement goals and catch formula must be established in the future, the committee shall compile the required data and make recommendations to the managing fisheries agencies.

Sturgeon

The population of sturgeon in the Columbia River appears residual above Bonneville Dam. The parties agree that the Indian tribes shall have a commercial fishery regulated by sound principles of conservation and wise use. A sport harvest may occur simultaneously for sturgeon above Bonneville Dam.

Winter Season

The treaty fishermen shall be allowed a mainstem commercial fishery for any species of fish between February 1, and April 1.

This comprehensive plan for managing anadromous fisheries on stocks originating from the Columbia River and its tributaries above Bonneville Dam is

adopted by the undersigned this 25th day of February, 1977.

/s/ Robert W. Straub
ROBERT W. STRAUB
Governor of Oregon

/s/ Dixy Lee Ray
DIXY LEE RAY
Governor of Washington

CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

/s/ Harold Culpus
HAROLD CULPUS

/s/ Watson Totus
WATSON TOTUS

CONFEDERATED TRIBES & BANDS OF THE YAKIMA INDIAN NATION

/s/ Leslie Minthorn
LESLIE MINTHORN

CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

/s/ Richard A. Halfmoon
RICHARD A. HALFMOON
CHAIRMAN, NEZ PERCE TRIBE OF IDAHO

/s/ Alta A. Guzman
ALTA A. GUZMAN, SECRETARY
NEZ PERCE TRIBE OF IDAHO

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